DOCTOR OF PHILOSOPHY

Indivisibility and interdependence of human rights; should there be limits to the European Court of Human Rights reading significant socio-economic elements into Convention rights?

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INDIVISIBILITY AND INTERDEPENDENCE OF HUMAN RIGHTS – SHOULD THERE BE LIMITS TO THE EUROPEAN COURT OF HUMAN RIGHTS READING SIGNIFICANT SOCIO-ECONOMIC ELEMENTS INTO CONVENTION RIGHTS?

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The candidate confirms that she is the author of the thesis and that the work submitted is her own and that appropriate credit has been given where reference has been made to the work of others.

The work of which the thesis is a record has been done by the candidate and it has not been previously accepted for a higher degree.

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Maša Marochini

Abstract

The main focus of this thesis is on the work of the European Court on Human Rights (the Court, ECtHR), namely on judgments by which the Court reads into the European Convention on Human Rights (the Convention, ECHR) rights with significant socio-economic elements already guaranteed under the European Social Charter (the Charter, ECS) and the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (ECPT). Reading in such rights into the Convention raises numerous problems, from practical ones concerning the implementation of judgments and the increase of the Court's workload, to the problem of the Court's inconsistency and finally to this being a threat to the Court's legitimacy. It will be argued that, despite the Court's wide powers when interpreting the Convention rights, there are rights already guaranteed under different Council of Europe (CoE) instruments and the Court should not extend the scope of the Convention into these areas, nor does it have the legitimacy to do so.

The thesis first sets out theoretical framework, research questions and methodology. The second chapter presents the current position of civil and political and economic and social rights within the regional and global human rights instruments. This will be followed by the theoretical approaches to differences among these two categories of rights, if any. The third chapter will be an introductory chapter to the European human rights system. In chapters IV, V, VI, and VII the case-law of the Court concerning judgments with significant socio-economic elements will be discussed. These chapters focus on four areas where this has happened: detention conditions and healthcare in prisons, the environment, healthcare in general, and housing. These rights are not guaranteed under the Convention, but are under the ECPT and the ESC. After presenting the Court's jurisprudence, the problems surrounding such Court's practice will be analysed. Furthermore, it will be questioned whether the Convention is suitable for protection of these rights, since there are other European instruments under which these rights are guaranteed. For that reason, the practice of the CPT and the ECSR will be analysed to show that the protection of the above stated rights is better left for these mechanisms to deal with. Another problem is that the Court when delivering judgments with significant socio-economic elements is often not setting clear standards and is being inconsistent, creating even more uncertainty among states regarding their

obligations under the Convention. The inconsistency of the Courts reasoning in the case-law discussed in chapters IV-VII is discussed in chapter VIII. Chapter IX discusses the Court's legitimacy in the context of the above mentioned issues. The final chapter concludes by summarising the findings in relation to the research questions.

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- Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, Assembly of Heads of State and Government of the Organization of African Unity, Ougadougou, Burkina Faso, June 1998, OAU/LEG/MIN/AFCHPR/PROT.(1) Rev.2.

Abbreviations

AfCHPR	African Charter on Human and Peoples' Rights
AfComHPR	African Commission on Human and Peoples' Rights
AfCtHPR	African Court on Human and Peoples' Rights
AmCHR	American Convention on Human Rights
AU	African Union
CESCR	Committee on Economic, Social and Cultural Rights
CLAHR	Committee on Legal Affairs and Human Rights
CoE	Council of Europe
COHRE	Centre on Housing Rights and Evictions
CoM	Committee of Ministers
CPT	European Committee for the Prevention of Torture and Inhuman and Degrading Treatment and Punishment
ECHR, Convention	European Convention on Human Rights
EComHR, Commission	European Commission on Human Rights
ECPT	European Convention for the Prevention of Torture and Inhuman or Degrading Treatment and Punishment
ECSR	European Committee of Social Rights
ECtHR, Court	European Court of Human Rights
ERRC	European Roma Rights Centre
ESC, Charter	European Social Charter
HRC	Human Rights Committee
I-AComHR	Inter- American Commission on Human Rights
I-ACtHR	Inter-American Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic and Social Rights
OAS	Organisation of American States
OSCE	Organisation for Co-operation and Security in Europe
UN	United Nations
UNHCR	UN Refugee Agency

VCLT	Vienna Convention on the Law of Treaties

CHAPTER I

INTRODUCTION

1.1. SETTING THE SCENE

The European Convention on Human Rights (the Convention, ECHR)[1] is generally considered to be the most effective system in providing individual protection of civil and political rights. Nevertheless, the European Court of Human Rights (the Court, ECtHR), the body that deals with individual applications alleging violations of the Convention is overwhelmed with applications and takes years to deliver judgments. Furthermore, even after the judgments become final, it takes several years for some of them to be executed. Some of the reasons for this situation are the greater awareness of individuals of their rights; the enlargement of the Council of Europe (CoE) with the accession of Central and Eastern European states; and, most importantly for this thesis, the Court's wide interpretation of Convention rights. The judges of the Court, when interpreting the Convention, can use either the self-restraint or the activist method of interpretation. In order for the Convention to be effective in the protection of rights, judges mainly resort to activist methods. On numerous occasions the Court stressed that the interpretation of the Convention text needs to be dynamic. Also, it has always been important to interpret the Convention as a 'living instrument' and to improve the protection of human rights in Europe by interpreting rights in a way that will make them practical and effective, instead of theoretical and illusory. However, the question that can be raised is whether interpreting Convention rights too extensively has only positive effects on the human rights protection or whether it might produce certain negative consequences. The Convention is intended to protect only the civil and political rights enumerated therein, to whose judicial protection states agreed when ratifying the Convention.

At the time when the Convention was being drafted, the overall scepticism towards giving economic and social rights the same protection as civil and political rights within the CoE was due to implementation-based reasons. The latter related to the perception

[1] The European Convention on Human Rights 1950, 87 UNTS 103; ETS 5.

of the two sets of rights as fundamentally different in their normative character. Civil and political rights were considered 'negative' rights that impose obligations on states to refrain from action, precise, cost-free and subject to immediate implementation, whereas economic, social and cultural rights were regarded as 'positive' rights that impose obligations on states to take action, vague and resource-demanding rights subject to progressive realisation. This reflected a well-established view that civil and political rights were duties of restraint, preventing the state from interfering with individual freedom rather than casting positive duties on the state to act. [2]

However, nowadays it is acknowledged that it is not always possible to separate civil and political rights from economic and social rights. The Court has shown its awareness of this fact. For example, in *Airey v Ireland* it stated: "While the Convention sets forth what are essentially civil and political rights, many of them have implications of a social or economic nature. The Court considers … that the mere fact that an interpretation of the Convention may extend into the sphere of social or economic rights should not be a decisive factor against such an interpretation [i.e. the interpretation of Article 6 proposed by the Court]: there is no water-tight division separating out that sphere from the field covered by the Convention."[3] Nevertheless, despite this acknowledgment, the Convention was drafted with the intention that it should primarily protect civil and political rights. Separate instruments for the protection of economic and social rights have been drawn up by the CoE.

1.2 RESEARCH HYPOTHESIS

The main issues for this thesis are the problems that arise when the Court delivers judgments interpreting the Convention so as to read rights with significant socio-economic elements into the Convention,[4] especially where this leads the Court into

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[2] Ida Elisabeth Koch *Human Rights as Indivisible Rights: The Protection of Socio-economic Demands under the European Convention on Human Rights* (Martinus Nijhoff Publishers 2009), 7.

[3] (1979-80) 2 E.H.R.R. 305 [50].

[4] On the inclusion of certain social and economic rights under the Convention see Colin Warbrick 'Economic and Social Interests and the European Convention on Human Rights' in Mashood A. Baderin and Robert McCorquodale (eds) *Economic, Social and Cultural Rights in Action* (OUP 2007), 241; Eva Brems 'Indirect Protection of Social Rights by the European Court of Human Rights' in Daphne Barak-Erez and Aeyal M. Gross (eds) *Exploring Social Rights Between Theory and Practice* (Hart Publishing 2007); Ida Elisabeth Koch *Human Rights as Indivisible Rights*… (n 2); and Ellie Palmer 'Protecting Socio-Economic Rights

areas that fall within the sphere of other CoE instruments, in particular the European Social Charter (the Charter, ECS)[5] and the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (ECPT).[6] The term 'rights with significant socio-economic elements' is used in this thesis is to mean rights that are related to socio-economic rights and that are already guaranteed by the ESC and the ECPT but not explicitly by the Convention. The main characteristics of such rights are that their execution can only be achieved progressively with the expenditure of large financial resources and that they usually concern a large group of people, and not just one individual.

The thesis focuses on four areas where the Court started interpreting the Convention so as to read rights with significant socio-economic elements therein: detention conditions and healthcare in prisons, the environment, healthcare in general, and housing. The reason for looking at the right to satisfactory detention conditions and healthcare in prisons, the right to a healthy environment, the right to healthcare in general and the right to adequate housing is because there is a significant body of case law of the Court in these areas (as well as considerable experience with implementation of the judgments) and they are all rights that are found in the ESC and ECPT (unlike the socio-economic rights found in Articles 1 and 2 of Protocol 1). Despite the Court's wide interpretative powers it cannot be said that the states could have reasonably expected that the Court would extend the Convention into these areas. It can be said that by reading in these right the Court not only widely interpreted Convention rights but started guaranteeing new rights already covered under other CoE instruments.

It will be argued that the Court's actions raise a number of concerns. They include both practical problems, notably in relation to the implementation of judgments and the Court's workload, as well as issues such as the lack of consistency in the Court's judgments and the legitimacy of the Court's actions. Each of these points is developed in more detail below. It will be further argued that as the areas in question are already covered by the instruments referred to, each of which has an adequate compliance

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through the European Convention on Human Rights: Trends and Developments in the European Court of Human Rights' (2009) 2(4) Erasmus L.Rev. 397.

[5] Original ESC, opened for signature on 18 October 1961 and entered into force on 26 February 1965, ETS No. 035 and Revised ESC, opened for signature on 3 May 1996 and entered into force on 1 July 1999, ETS No. 163.

[6] The ECPT, signed on 26 September 1987, entered into force on 1 February 1989, ETS No. 126. Text amended by Protocols No. 1 (ETS No. 151) and No. 2 (ETS No. 152).

mechanism, the Court should not extend the scope of the Convention any further into these areas.

This issue is particularly important when it comes to the right to a healthy environment, the right to healthcare in general and the right to adequate housing which are already guaranteed under the ESC since not all States parties to the Convention have ratified the Charter nor have they all accepted provisions guaranteeing the right to health (which includes the right to a healthy environment) or the right to housing. Finally, only 15 of them have accepted the Collective Complaints Protocol.

It is also appropriate to point out now that the choice of Article 3 and the right to satisfactory detention conditions and healthcare in prisons is rather different from the other areas discussed. Providing satisfactory detention conditions and healthcare in prisons is not guaranteed under the ESC but under the ECPT. Also, for the cases concerning the detention conditions and healthcare in prisons the key socio-economic issues relate to the execution of the judgments (although, even detention conditions have some socio-economic normative elements) whereas for the others it relates to the normative content of the rights themselves. The issue of detention conditions and healthcare in prisons on most occasions impacts the whole population of a detention centre and requires large financial expenditure and only through progressive implementation can the state improve the situation. This is the reason for an examination of Article's 3 detention conditions and healthcare in prisons under this thesis, despite its considerable difference with the other rights discussed.

The reason for not selecting the right to work is because the Court's case law is quite limited and the reason for not selecting the right to social security is because the cases are largely concerned with procedural issues under Article 6 and not with the substance of social security.[7]

Looking back at the problematic issues stated above, regarding the implementation of judgments concerning the right to satisfactory detention conditions and healthcare in

[7] See case *Sidabras and Dziautas v Lihuania*, App nos 55480/00 and 59330/00 (ECtHR, 27 July 2004) on the right to work in the context of the Article 8 right to respect for private life and Article 14 prohibition of discrimination. This case involved the dismissal and ban from access to public and private sector employment of the applicants for a period of ten years, because of their status as former agents of the KGB and where the Court was prepared to accept that the right to private life can encompass the applicants' right to work. As to the cases concerning the right to social security see cases *Feldbrugge v Netherlands* (1986) 8EHRR 425, *Schuler-Zraggen v Switzerland* (1993) 16 EHRR 495, and *Salesi v Italy* (1993) 26 EHRR 187.

prisons, the right to a healthy environment, the right to healthcare in general and the right to adequate housing, the execution of judgments concerning all these rights often brings considerable difficulties for the states concerned. In most cases, compliance with such judgments is financially demanding and time-consuming, and requires general, rather than individual, measures to be taken.

Secondly, by reading socio-economic elements into many Convention rights, the Court encourages more applications, thereby adding to its already excessive workload. With the accession of Central and Eastern European states, the CoE now consists of 47 Member States with 800 million citizens, all possible applicants to the Court.[8] Despite the substantial increase in the Court's productivity and its output in general, the caseload continues to rise considerably, putting the effectiveness and credibility of the Convention system in serious danger. In 2011 alone the total number of pending applications allocated to a judicial formation was 151, 600.[9] So far, the scholars and the experts who have focused on the problem of the Court's overload have looked at possible solutions within the Convention system itself. The main solution provided so far is Protocol 14 (discussed in chapter III below). However, Protocol 14 itself is not sufficient to solve the problem of the Court's overload. Further solutions should be looked for outside the Convention, but within the CoE system. It will be argued later in the thesis that there are other CoE mechanisms besides the Court that could provide effective human rights protection for some of the matters currently dealt with by the Court, and that if the Court were to recognise and act upon this, it could lead to an appreciable decrease in the Court's excessive caseload.

The reading of socio-economic elements into Convention rights by the Court has been achieved through various interpretative methods. The right to have satisfactory detention conditions and healthcare in prison of a certain standard has mainly been introduced through the Court's use of the living instrument doctrine. Although not using the term 'living instrument', it can be concluded that the Court started interpreting Article 3 in a way that unsatisfactory detention conditions can give rise to its violation

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[8] The number of applications is likely to increase further if/when the European Union becomes a party to the Convention. The accession of the EU to the ECHR became a legal obligation under the Treaty of Lisbon, which entered into force on 1 December 2009 (see Article 6 (2)). The legal basis for the accession of the EU is provided for by Article 59 (2) ECHR, as amended by Protocol No. 14 to the ECHR.

[9] European Court of Human Rights, Statistics 2011,
<http://www.echr.coe.int/NR/rdonlyres/7B68F865-2B15-4DFC-85E5DEDD8C160AC1/0/Stats_EN_112011.pdf> accessed on 13 July 2012.

through the use of the living instrument doctrine.[10] Another doctrine of interpretation used by the Court is the doctrine of effectiveness, which allows the judges to give the fullest weight and effect to the Convention. By using this doctrine the judges started introducing into the Convention rights already placed within the ESC, such as the right to a healthy environment, the right to healthcare and the right to adequate housing. It will be argued that when the Court has used these methods of interpretation in this way, it has not done so in a consistent manner. The degree of inconsistency is such as to create considerable uncertainty for the State parties as to the law and their obligations.

In reading in rights with significant socio-economic elements that are already guaranteed under the ECPT and the ESC into various Convention provisions, the Court also threatens its legitimacy since one of the preconditions of its legitimacy is a commitment to the rule of law. Commitment to the rule of law must include things like an equal or impartial application of law, the predictability of law, and that law is applied in a non-arbitrary way.[11] The problematic issue in the context of judgments with significant socio-economic elements that will be discussed in the thesis is the equal application of law and its predictability or the lack of it. While it is legitimate for the judges of the Court to interpret the Convention,[12] in order for interpretation to stay within the ambit of legitimacy it should not read new rights into the Convention, but give meaning to existing rights. Furthermore, although not bound by precedents, the Court should deliver its judgments in a consistent manner. The Court threatens its legitimacy by imposing on states obligations that they have never signed up to, by often not setting clear standards when interpreting the Convention, and by being inconsistent in its judgments, thereby making it impossible for States parties to know their obligations under the Convention.

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[10] "Having regard to the fact that Convention is a 'living instrument which must be interpreted in the light of present-day conditions', the Court considers that certain acts which were classified in the past as 'inhuman and degrading treatment' as opposed to 'torture' could be classified differently in future. It takes the view that the increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies." *Selmouni v France* (2000) 29 E.H.R.R. 403 [101]. By analogy we can conclude that what used to be interpreted by the Court only as unsatisfactory detention conditions without actual violation of Article 3 will in some cases nowadays be considered as violations of Article 3.

[11] Jeffrey A Brauch, 'The Margin of Appreciation and the Jurisprudence of the European Court of Human Rights: Threat to the Rule of Law' (2004-2005) 11 Colum. J. Eur. L. 113, 124. The Court itself also pointed out that it is in the interests of legal certainty, forseeability and equality before the law that it should not depart, without good reasons from its previous case-law. *Chapman v United Kingdom* (2001) 33 E.H.R.R. 18 [70].

[12] Dragoljub Popović, *The Emergence of the European Human Rights Law, An Essay on Judicial Creativity* (Eleven International Publishing 2011); Ronald Dworkin, 'Law as Interpretation' (1982) 60 Texas Law Review 527.

It will be questioned in later chapters whether the Convention is suitable for protection of the rights considered in this thesis (the rights to satisfactory detention conditions and healthcare in prisons, to a healthy environment, to healthcare of a certain standard, and to adequate housing), since there are other CoE instruments that address those rights, namely the ESC, with the European Committee on Social Rights (ECSR) as its principal compliance mechanism, and the ECPT, with the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) as its compliance mechanism. The practice of the ECSR and CPT will be analysed in later chapters in order to try to show that the protection of the above-mentioned rights is better left for these mechanisms to deal with.

It is appropriate here to introduce the ESC and ECPT.[13] The ESC, as it name suggests, is a treaty on economic and social rights that places obligations on states to guarantee the rights by which they have agreed to be bound.[14] Not all State parties to the Convention have ratified the Charter, and only fifteen of them have ratified the Collective Complaints Protocol, which provides a quasi-judicial protection for Charter rights by means of a collective complaints procedure. In some aspects, through its interpretative methods, the Court has started guaranteeing rights already protected under the Charter and not by the Convention, and by doing so, it has started placing obligations with significant socio-economic elements on states to which they have not agreed when ratifying the Convention. The Court has also not taken sufficient account of the fact that not all State parties to the Convention are parties to the Charter, or to the Collective Complaints Protocol. The reason that some states have not (yet) accepted the Collective Complaints Protocol may be because they do not agree that economic and social rights are justiciable.

The ECPT is not a treaty on economic and social rights but deals exclusively with Article 3 of the Convention, which prohibits torture and inhuman or degrading treatment or punishment. The ECPT established the CPT to supervise the treatment of persons deprived of their liberty with a view to strengthening, if necessary, the protection of such persons from torture and inhuman or degrading treatment or punishment.[15] The CPT regularly conducts visits to places of detention and examines

[13] Discussion of the ESC will be relatively brief as it is dealt with in more detail in chapter III.
[14] Under the ESC States parties are not required to accept all the rights that it contains. This matter is explained further in chapter III.
[15] ECPT, Article 1.

whether persons deprived of their liberty are provided with satisfactory detention conditions and healthcare. The CPT, although a non-judicial body, has so far established numerous standards on detention conditions and healthcare in prisons that the states should comply with. It expects states to gradually bring their detention situations in conformity with those standards and regularly examines their progress. The Court has started using the CPT standards when finding whether a violation of Article 3 occurred in respect of detention conditions and healthcare in prisons. This has led to numerous new applications being made to the Court. Furthermore, the Committee of Ministers (CoM), when examining whether a state has executed a judgment concerning detention conditions or healthcare in prisons, looks mainly at the CPT reports or the state reports (usually sent both to the CPT and the CoM).

Leaving the CPT to deal exclusively with those issues would in no way lesser the protection of these rights, since the CPT, despite being a non-judicial body, co-operates with states successfully and all member states of the CoE are also parties to the ECPT. Through its political pressure the CPT can and does prompt states into taking positive steps regarding detention conditions. Despite the non-binding character of CPT's reports, states have shown a willingness to bring the situation in their detention centres into conformity with the CPT standards. As will be argued, whether the Court has delivered a binding judgment concerning detention conditions or the CPT has adopted a report does not make any difference when it comes to states bringing detention conditions into conformity with the required standards.

In summary, what this thesis argues is that, instead of placing obligations on states concerning rights with significant socio-economic elements to which they have not agreed when signing the Convention and which are already protected by the ESC and the ECPT, the Court should focus on its primary obligation – protecting rights already guaranteed under the Convention – and leave the rights protected under other CoE instruments for the compliance mechanisms of those instruments to deal with. Despite the lack of judicial powers of those mechanisms, they can provide effective protection of rights guaranteed under their respective treaties.

1.3 THE STRUCTURE OF THE THESIS

The second chapter of the thesis will present the current position of civil and political and economic and social rights within regional and global human rights instruments. This presentation will be followed by a discussion of the theoretical approaches to differences between these two categories of rights, if any. Nowadays it is widely accepted among scholars that civil and political and economic and social rights are generally not different in their nature,[16] and that both categories of rights can impose three different types of duties: to respect, to protect and to fulfil.[17] This indivisibility among rights has also been proclaimed in conclusions of various human rights conferences.[18] Although in theory the interconnection and indivisibility of all human rights have been stressed from the very beginning of the human rights discussion, in practice they have never been equally protected. The reasons for that kind of discrepancy will also be analysed. The situation with civil and political and economic and social rights within UN human rights system and the American, African and European regional systems will be presented to see the situation regarding the protection of rights within these systems.

Since the first point of the research hypothesis is that it is undesirable for the Court to interpret the Convention so as to place obligations with socio-economic elements in relation to the rights in Articles 2, 3 and 8, a chapter on the protection of rights within the CoE is essential. Therefore, the third chapter will be an introduction to the Convention and the Court (including its working methods) and to the ESC and the ESCR. Since the CPT and the ECPT will only be analysed under chapter IV (on the

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16 Theo van Boven, 'Categories of Rights' in Daniel Moeckli et al. (eds), *International Human Rights Law* (OUP 2010), 173; Abdullahi A. An-Na'im, 'To Affirm the Full Human Rights Standing of Economic, Social and Cultural Rights' in Yash Ghai and Jim Cottrell (eds), *Economic, Social and Cultural Rights in Practice, The Role of Judges in Implementing Economic, Social and Cultural Rights* (Interights 2004); and Craig Scott 'Reaching Beyond (Without Abandoning) the Category of "Economic, Social and Cultural Rights"' (1999) 21 Hum. Rts. Q. 633.

17 Henry Shue, *Basic Rights, Subsistence, Affluence and U.S. Foreign Policy* (Princeton University Press 1980), 52; Asbjørn Eide, UN Special Rapporteur for the Right to Food, *The Right to Adequate Food as a Human Right: Final Report submitted by Asbjørn Eide*, (1987) UN Doc E/CN.4/Sub.2/1987/23, 67–69. See also Asbjørn Eide, 'Economic, Social and Cultural Rights as Human Rights' in Asbjørn Eide et al. (eds) *Economic, Social and Cultural Rights, A textbook* (Kluwer Law International 2001), 23-24.

18 Proclamation of Teheran, Final Act of the International Conference on Human Rights, Teheran, 22 April to 13 May 1968, (1968) U.N. Doc. A/CONF. 32/41 at 3 [13]; UN General Assembly, The Vienna Declaration and Programme of Action from 1993, A/CONF.157/23, [5]; UN General Assembly, *2005 World Summit Outcome: resolution/adopted by the General Assembly*, 24 October 2005, A/RES/60/1 [121]; UN General Assembly, *Human Rights Council: resolution/adopted by the General Assembly*, 3 April 2006, A/RES/60/251, preamble [3].

detention conditions and healthcare in prisons) the work of the CPT will be discussed in that chapter. The interpretative methods used by both the Court and the ESCR when delivering judgments and decisions will also be discussed, since it was exactly the use of activist interpretative methods that allowed the judges of the Court and the members of the ECSR to extend the scope of certain rights. Finally, in chapter III, the CoM, the body that monitors the execution of the Court's judgments and of the ECSR decisions and conclusions, will be discussed. As will be seen, there have been numerous criticisms of the CoM's work, both under the Convention and under the ESC system, since it is quite mild and non-critical as a supervisory body.

There are several important issues in the context of the Court's judgments with significant socio-economic elements that will be presented in the following chapters. In the discussion of the Court's jurisprudence, the focus will be on three Convention rights, namely certain aspects of Article 2 (the right to life), Article 3 (the right to freedom from torture and inhuman or degrading treatment or punishment) and Article 8 (the right to respect for private and family life and the home).

First, in chapter IV the Court's jurisprudence concerning Article 3 prohibiting torture and inhuman and degrading treatment and punishment of the Convention will be analysed. Greatest attention will be given to detention conditions and the right to healthcare in prisons. The Court started interpreting Article 3 of the Convention so as to guarantee the right to have satisfactory detention conditions and the right to healthcare in prisons only from 2001 and there have been numerous cases since. Furthermore, the work of CPT will be examined and presented. The CPT now represents the most effective machinery for dealing with unsatisfactory detention conditions and healthcare in prisons. It will be argued that the way to deal with unacceptable detention conditions is through the work of the CPT instead of through the Court's jurisprudence. Doing that would allow the Court to deal with the more serious and individualised cases of Article 3 violations and the CoM to focus on the execution of judgements that objectively can and must be examined more individually and speedily. Although this chapter does not deal directly with economic and social rights or with the ESC, this is rather an important issue to discuss. Violations of Article 3 based solely on poor detention conditions or on unsatisfactory healthcare have numerous socio-economic elements. As will be seen, when the Court finds such a violation, those judgments generally apply not only to the individual applicant(s)

bringing the case, but to all persons in that (and similar) detention centres. Also, execution of these judgments usually has large budgetary implications and it takes years for the state to bring the situation into compliance with the judgments. On most occasions, the Court relies on the findings of the CPT, and the CoM does the same. So, instead of dealing with the large number of applications concerning healthcare and living conditions in detention, the Court would be better leaving these situations to the CPT which deals exclusively with those matters. This will also help to reduce the Court's workload.

Chapter V will look at the right to a healthy environment, first as dealt with through the Court jurisprudence. The Convention contains no explicit or implicit reference to the right to a healthy environment. In 2003 and 2009 the Committee on Legal Affairs and Human Rights (CLAHR) of the Parliamentary Assembly of the Council of Europe stated that adding a protocol to the Convention on the right to a healthy environment was not a good idea.[19] Nevertheless, the Court has through its jurisprudence, particularly on Article 8 of the Convention (and in certain situations on Article 2), started interpreting the Convention so as to include the right to a healthy environment. When the Court finds a violation of the right to a healthy environment under the Convention, execution of a judgment in its entirety usually requires the introduction of numerous general measures. The ESC also does not explicitly include the right to a healthy environment. Nevertheless, it does so implicitly under Article 11(3) of the Charter which obliges State parties to take appropriate measures to prevent, as far as possible, epidemic, endemic and other diseases, as well as accidents.[20] This provision seems much more suitable for interpretation in such a way as to guarantee the right to a healthy environment than Articles 2 and 8 of the Convention. Already in its conclusions in the Reporting system, the ECSR started interpreting the Charter so as to guarantee the right to a healthy environment and this has continued in the ECSR decisions on collective complaints. Therefore, as will be argued, the right to a healthy environment is now, through the interpretation of the ECSR, included in the ESC. Consequently, the right to a healthy environment is more suitable and better placed under the ESC than the Convention.

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[19] Parliamentary Assembly, 'Preparation on an additional protocol to The European Convention on Human Rights, on the right to a healthy environment', Opinion, Committee on Legal Affairs and Human Rights, Doc. 9833, 19 June 2003; Parliamentary Assembly, 'Preparation on an additional protocol to The European Convention on Human Rights, on the right to a healthy environment', Opinion, Committee on Legal Affairs and Human Rights, Doc. 12043, 29 September 2009.

[20] Article 11(3) of the Revised ESC (n 5). Under the Original ESC there is no reference to accidents.

The chapter on the right to a healthy environment will be followed by a chapter on the right to healthcare. Just as with the right to a healthy environment, the Convention contains no reference to healthcare rights. Unlike the Convention, the ESC has an exhaustive provision on the right to healthcare, Article 11. It will be argued that the Court has shown much more reluctance when it comes to reading a right to healthcare into the Convention than it has in guaranteeing the right to satisfactory detention conditions, healthcare in prisons and the right to a healthy environment. The issue of providing a right to a healthcare has mainly been raised before the Court in relation to Article 2 of the Convention on the right to life, and sometimes in relation to Article 8 and the Court has started giving indications that it might enter this sphere. It has also been raised under Article 3 deportation cases. Despite the fact that the ESC system, particularly the Collective Complaints procedure, is accepted by considerably fewer states than the Convention, this is not an area where the Court should enter, since the ECSR has so far proven to be successful in formulating clear standards regarding states' obligations under Article 11 of the ESC, both in its conclusions under the Reporting system and in its decisions on collective complaints.

In chapter VII, the right to adequate housing will be presented as another economic and social right. It is guaranteed under three provisions of the ESC, Articles 31, 23 and 16. Unlike the Charter, the Convention contains no guarantee on the right to adequate housing, but again the Court has started interpreting the Convention as though it might include a right to adequate housing. In this chapter the Court's jurisprudence on right to adequate housing will be divided into three groups. The first group will represent the cases where the state was directly the cause of the applicant's homelessness: these cases are not problematic or controversial. The second and the third groups of cases, which concern situations where homelessness resulted from, respectively, lawful actions by state bodies or the absence of positive measures by the state, are the problematic ones. Again, the Court has entered the socio-economic sphere and done so in a somewhat discretionary and inconsistent manner. The ECSR, on the other hand, has shown itself to be much more consistent and appropriate for dealing with the issues concerning the right to adequate housing. It has created certain standards that it applies through its conclusions under the reporting system and decisions on collective complaints. Unlike the Court, it does not approach the issue on a case by case basis, but deals with it on a more consistent level.

The right to life, the prohibition of torture and other forms of ill-treatment and the right to private life, family life, home and correspondence are traditional civil and political rights. Although progressive interpretation of Convention rights is generally to be welcomed, there are certain problematic issues arising out of giving those rights a socio-economic dimension through interpretation. Within all the four chapters on the Convention provisions summarised above, the work of the CoM will also be analysed. The CoM reports on the state of the execution of judgments with significant socio-economic elements will be presented since they represent a clear indicator of the progressive nature of these judgments and their strong budgetary implications. It will also be suggested that, regardless of whether the CoM supervises the execution of a binding judgment or of a non-binding decision of the ECSR, the pressure that it places on states does not differ much and in both cases is weak.

The problems of the uncertainty and inconsistency of the Court's case-law will be presented in chapter VIII. The emphasis will be on the cases analysed in chapters IV, V, VI and VII where the judges of the Court widely used their interpretative powers and through the use of these powers started placing obligations on states to which they have not agreed when signing the Convention and which have significant socio-economic elements. By doing that, the Court made it hard or even impossible for the States parties to know their obligations under the Convention. This uncertainty is further enhanced by the Court's inconsistency when reaching different conclusions in cases with similar factual situations. The problem of inconsistency is least problematic in cases concerning unsatisfactory detention conditions and the healthcare in prisons. On the other hand, in the cases concerning the right to a healthy environment and the right to adequate housing, inconsistency in the Court's reasoning is quite visible and problematic. The Court's inconsistency is therefore only creating even more uncertainty within the states regarding their obligations under the Convention and as such, it will be analysed.

Finally, in chapter IX legitimacy issues concerning the reading into the Convention of new rights with significant socio-economic elements by the Court will be analysed. Legitimacy is an extremely important attribute for legal institutions like the Court. The Court relies on its legitimacy to gain respect for and observance of its judgements by States parties to the Convention. In discussing and analysing issues of legitimacy, five

models of legitimacy will be used, following the approach of Joshua L. Jackson.[21] Those are: formal legitimacy, procedural legitimacy, social legitimacy, normative legitimacy, and legal legitimacy. As will be seen, the most endangered nowadays is the procedural legitimacy since it depends on a function being publicly perceived as legalistic. With the Court reading significant socio-economic elements into Convention rights in ways that duplicate other CoE instruments and by doing so inconsistently, the procedural legitimacy of the Court, dependent on a commitment to the rule of law, is brought into question.

1.4 METHODOLOGY

The approach to the issues dealt with in this thesis has been a practical and pragmatic one, based on a largely positivist philosophy of law. The methodology used in researching and writing this thesis has, not surprisingly, been the traditional desk-top, library-based approach used by many positivist legal scholars. In particular, no empirical research has been carried. It might have been desirable, for example, to test the hypothesis of this thesis by interviewing judges of the European Court of Human Rights. However, even if the judges had been willing to be interviewed in this way (which may be doubtful), this was not a practical possibility for reasons of time and cost. The lack of interviews with the judges is mitigated by the fact that many of them have publicly expressed their views on many of the matters discussed in this thesis both judicially (in separate and dissenting opinions) and extra-judicially (in academic writings). These materials are drawn on at appropriate points in the thesis. In general, the materials used in this thesis are those in the public domain and, for practical reasons, are confined largely to those written in English.

The primary sources used for writing this thesis included, above all, the relevant jurisprudence of the Court on the right to satisfactory detention conditions and healthcare in prisons, the right to a healthy environment, the right to healthcare and the right to adequate housing. In addition, relevant CPT general reports and reports to states were examined, together with the relevant provisions of the ESC, and the ECSR conclusions under the Reporting system and its decisions on collective complaints

[21] Joshua L. Jackson, 'Note: Broniowski v Poland: A Recipe for Increased Legitimacy of the European Court of Human Rights as a Supranational Constitutional Court' (2006-2007) 39 Conn .L. Rev. 759.

relating thereto. Furthermore, reports of the CoM on the execution of the Court's judgements were analysed, as well as the CoM's resolutions and recommendations on the conclusions and decisions of the ESCR. Useful statistics regarding the Convention system and the ESC system were found on the CoE's website.[22] This website also contained a lot of helpful information regarding the work of the Court, ESCR and the CoM.

Turning to secondary sources, the authors whose books and articles were found particularly-helpful when researching the Convention and the ESC system in general as well as their specific provisions included A. Mowbray,[23] P. Leach,[24] D.J. Harris, M. O'Boyle and C. Warbrick,[25] M.W. Janis, R.S. Kay and A.W. Bradley,[26] F.G. Jacobs, R.C.A. White and C. Ovey,[27] S. Greer,[28] U. Khaliq and R. Churchill,[29] M. Langford, [30]A. Nolan,[31] D.J. Harris and J. Darcy,[32]and G. de Burca and B. de Witte[33]. The thoughts and

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[22] CoE's website <http://www.coe.int/> accessed 13 July 2012.

[23] Alastair Mowbray, *Cases and Materials on The European Convention on Human Rights* (2nd ed, OUP 2007); Alastair Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (Hart Publishing 2004); and Alastair Mowbray, 'The Creativity of the European Court of Human Rights' (2005) 5 Hum. Rts. L. Rev. 57.

[24] Philip Leach, *Taking a case to the European Court of Human Rights* (3rd ed, OUP 2011); Philip Leach, Helen Hardman, Svetlana Stephenson and Brad K. Blitz, *Responding to Systemic Human Rights Violations - An analysis of pilot judgments of the European Court of Human Rights and their impact at national level* (Intersentia 2010).

[25] David Harris, Michael O'Boyle and Colin Warbrick, *Law of the European Convention on Human Rights* (2nd ed, OUP 2009).

[26] Mark W. Janis, Richard S. Kay and Anthony W. Bradley, *European Human Rights Law: Text and Materials* (3rd ed, OUP 2008).

[27] Robin C.A. White and Clare Ovey, *The European Convention on Human Rights* (5th ed, OUP 2010).

[28] Steven Greer, *The Margin of Appreciation: Interpretation and Discretion under the European Convention on Human Rights* (CoE 2000); Steven Greer, *The European Convention on Human Rights: Achievements, Problems and Prospects* (CUP 2006).

[29] Urfan Khaliq and Robin Churchill, 'The Protection of Economic and Social Rights: A Particular Challenge?' in Helen Keller and Geir Ulfstein (eds), *UN Human Rights Treaty Bodies: Law and Legitimacy* (CUP 2012); Urfan Khaliq and Robin Churchill, 'The European Committee of Social Rights: putting flesh on the bare bones of the European Social Charter' in Malcolm Langford (ed), *Social Rights Jurisprudence, Emerging Trends in International and Comparative Law* (CUP 2008); Robin Churchill and Urfan Khaliq, 'Violations of Economic, Social and Cultural Rights: The Current Use and Future Potential of the Collective Complaints Mechanism of the European Social Charter' in Baderin and McCorquodale (eds), (n 4); and Robin Churchill and Urfan Khaliq, 'The Collective Complaints System of the European Social Charter, An Effective Mechanism for Ensuring Compliance with Economic and Social Rights?' (2004) 15(3) Eur.J.Int.Law 417.

[30] Langford (ed), *Social Rights Jurisprudence*… (n 29); and Aoife Nolan, Bruce Porter and Malcolm Langford, *The Justiciability of Social and Economic Rights: An Updated Appraisal* (Center for Human Rights and Global Justice Working Paper Series No. 14, New York University and the Committee on Administration of Justice Northern Ireland 2007).

[31] Aoife Nolan, '"Aggravated violations", Roma housing rights and forced expulsions in Italy: recent developments under the European Social Charter collective complaints system' (2011) 11(2) H.R.L.Rev. 343; Nolan, Porter and Langford (n 29); and Aoife Nolan 'Addressing economic and social rights violations by non-state actors through the role of the state: a comparison of regional approaches to the "obligation to protect"' (2009) 9(2) H.L.R.Rev. 225.

[32] David Harris and John Darcy, *The European Social Charter* (Ardsley N.Y. 2001).

[33] Grainne de Burca and Bruno de Witte, *Social Rights in Europe* (OUP 2005).

opinions of A. Eide,[34] H. Shue,[35] I.E. Koch,[36] and S. Fredman[37] on important theoretical issues, particularly regarding the difference between economic and social rights and civil and political rights, were also of great help. As to the interpretative methods used by the European Court and related issues of legitimacy, the opinions and writings of acknowledged political and legal philosophers and theorists, such as T. Franck,[38] G. Letsas,[39] D. Popović,[40] J.L. Jackson,[41] P. Mahoney[42] and others, were of great use.

1.5 RELATIONSHIP OF THE THESIS TO THE EXISTING LITERATURE

The contribution of this thesis to the existing literature is that it deals with some issues that have not been examined in the existing literature on the Convention system. The authors mentioned above do not question the legitimacy of the Court in interpreting the Convention as to new, positive obligations with significant socio-economic elements. Of course, there are authors that discuss the Court's legitimacy[43] as well as the authors that write on the development of positive obligations under the Convention, and even on positive obligations with socio-economic elements, but none of them argue that those issues are interconnected and problematic.

In his book, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights,* Alastair Mowbray writes on the development of positive obligations through the Court's interpretation of Convention rights. This book provides an extremely good guide to the Court's case-law on positive obligations. However, it does not deal specifically with judgments having significant socio-economic elements nor does it question the negative consequences of delivering such judgments. Furthermore, Mowbray does not look at the process or difficulties of implementing

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[34] Eide et al. (eds), *Economic, Social and Cultural Rights, A textbook* (n 17).
[35] Shue (n 17).
[36] Koch, *Human Rights as Indivisible Rights*… (n 2).
[37] Sandra Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (OUP 2008).
[38] Thomas Franck, *The Power of Legitimacy among Nations* (OUP 1990); and Thomas Franck, 'Why a Quest for Legitimacy?' (1987-1988) 21 U.C. Davis L. Rev. 535.
[39] George Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (OUP 2009).
[40] Popović, *The Emergence of the European Human Rights Law*… (n 12); and Dragoljub Popović 'Prevailing of Judicial Activism over Self-Restraint in the Jurisprudence of the European Court of Human Rights' (2008-2009) 42 Creighton L. Rev. 361.
[41] Jackson (n 21).
[42] Paul Mahoney, 'Judicial activism and judicial self-restraint in the European Court of Human Rights: two sides of the same coin' (1990) 11 Hum.Rts.L.J. 57.
[43] Jackson (n 21); Basak Cali, Anne Koch and Nicola Bruch, *The Legitimacy of the European Court of Human Rights: The view from the ground* (UCL 2010); Brauch (n 11).

those judgments. Also, this book dates from 2004 and so predates much of the jurisprudence discussed in this thesis.

Another author whose publications somewhat relate to this thesis is Ida Elisabeth Koch, particularly her book *Human Rights as Indivisible Rights: The Protection of Socio-economic Demands under the European Convention on Human Rights*. This book consists of some general remarks on how the Court started including protection of economic and social rights under the Convention. She includes the right to housing and the right to health in her analysis, but there is no mention of the right to a healthy environment or of the rights to satisfactory detention conditions or healthcare in detention. Moreover, she does not question or analyse the consequences of the Court reading in rights with socio-economic elements within the Convention, nor does she think that such a development might not be a good idea. Furthermore, like Mowbray, she does not consider or question the legitimacy of this development.

Dimitris Xenos has also written a book on the positive obligations of states entitled *The Positive Obligations of the State under the European Convention of Human Rights*.[44] Xenos takes a different approach from Mowbray in his book on positive obligations and is much more critical; however, his approach is also rather different from that of this thesis. He does not focus on the difference between economic and social rights and civil and political rights as this thesis does, nor does he discusses other human rights instruments within the CoE that might be better suited for the protection of certain categories of rights. Also, his approach is more theoretical with no focus on the practical problems arising out of imposing positive obligations on states and without an exhaustive overview of the Court's judgments, particularly those with socio-economic elements. Finally, there is no discussion, at least not as detailed as in this thesis, of the Court's interpretative methods and of the legitimacy issues related thereto.

Dragoljub Popović, a judge of the European Court of Human Rights, in his book, *The Emergence of the European Human Rights Law, An Essay on Judicial Creativity*,[45] gives an exhaustive overview of the Court's creativity and its interpretative methods, both the activist and the self-restraint ones. However, this book does not give special attention to judgments with significant socio-economic elements that are given the greatest attention

[44] Dimitris Xenos, *The Positive Obligations of the State under the European Convention of Human Rights* (Routledge 2011).
[45] Popović, *The Emergence of the European Human Rights Law*… (n 12).

in this thesis nor does it question the legitimacy of the Court's work.

Finally, none of the authors mentioned in this section look into the possible alternatives within the CoE for the protection of rights, nor do they look at what happens after the judgment becomes final and gets to the execution stage. Therefore, the work of the CoM when supervising the execution of judgments or the other instruments within Europe envisaged for human rights protection that might be better placed for protection of rights with socio-economic elements are not analysed or questioned in any of the literature that deals with issues similar to this thesis.

1.6 CONCLUSION

To sum up: this thesis looks at those traditional civil and political rights that have been interpreted by the Court in such a manner that they now include significant socio-economic elements. After analysing and questioning the interpretation by the Court of the rights concerned and presenting possible alternatives for their protection in chapters IV-VII, it will be argued in the following chapters that this development in interpretation by the Court has produced excessive uncertainty and inconsistency and has imposed obligations on states that they never accepted when ratifying the Convention, and that consequently this has undermined the Court's legitimacy.

CHAPTER II

CIVIL AND POLITICAL AND ECONOMIC AND SOCIAL RIGHTS- INDIVISIBLE OR SEPARABLE?

2.1 INTRODUCTION

This chapter will analyse the differences between economic and social rights and civil and political rights. It will be argued that, despite the indivisibility between the two categories of rights being nowadays so often stressed, the fact is that in practice they are still far from being indivisible. Later on through the thesis, in chapters IV-VII, the Court's reading significant socio-economic elements into various Convention rights will be analysed. There are several reasons for this approach by the Court being inadvisable, and one of these reasons is the fact that economic and social rights and civil and political rights are still separated, particularly when it comes to states' acceptance of their justiciability. Although numerous proclamations of their indivisibility and interdependence have been made, only one regional human rights document, namely the African Charter, makes no distinction between rights.[46] States often oppose giving economic and social rights the same level of protection as to civil and political rights. Securing these entitlements is likely to require either increased government expenditures or increased governmental regulation of the economy.[47]

Traditionally, human rights have been divided into three categories or generations of rights. According to this, civil and political rights were considered to be 'first generation' rights, economic and social 'second generation' rights, whereas the 'third generation'

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[46] On the international level the Convention on the Rights of the Child (UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3), the Convention on the Elimination on all Forms of Discrimination against Women (UN General Assembly, *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, United Nations, Treaty Series, vol. 1249, p. 13), and the Convention on Elimination of all Forms of Racial Discrimination (UN General Assembly, *International Convention on the Elimination of All Forms of Racial Discrimination*, 21 December 1965, United Nations, Treaty Series, vol. 660, p. 195) are examples of instruments where both sets of rights are found side by side. The Charter of Fundamental Rights of the European Union (2000/C 364/01) also makes no distinction between civil and political and economic and social rights.

[47] Philip Harvey, 'Human Rights and Economic Policy Discourse: Taking Economic and Social Rights Seriously' (2002) 33 Columbia Human Rights Law Review 364, 368.

rights were rights of solidarity.[48] This was due to the fact that at the beginning of the human rights era there existed in legal theory a well-established view that civil and political rights were duties of restraint, preventing the state from interfering with individual freedom rather than casting positive duties on the state to act. As such, they were thought to be more appropriate for judicial resolution than economic and social rights. Protection by the state against want or need was to be assigned to the realm of policy, and economic and social rights to the realms of aspiration. However, nowadays, in theory, there is the recognition of the unity of civil and political rights with economic and social rights. Nevertheless, this recognition of their unity is more theoretical then practical. Although numerous authors keep stressing their interconnection, indivisibility and interdependence,[49] in reality the situation is different and the conclusion that these two groups of rights are no longer separable is rather premature.[50]

Nevertheless, the classic distinction between civil and political rights as negative and determinate rights that have no budgetary implications and are appropriate for immediate implementation, while economic and social rights as positive and vague rights that are financially demanding and can be only achieved progressively, is no longer acceptable.[51] In this chapter the current debate over the distinction between civil and political rights and economic and social rights will be presented. First, the way in which the two categories of rights are given effect to in regional and global instruments will be analysed. This will be followed by an exploration of the more theoretical debates over the nature of the two sets of rights. It will be shown that although they might be indivisible in theory, they are still rather separate in practice.

2.2 CIVIL AND POLITICAL RIGHTS AND ECONOMIC AND SOCIAL RIGHTS IN GLOBAL AND REGIONAL HUMAN RIGHTS INSTRUMENTS

One of the most explicit proclamations of indivisibility of civil and political and economic and social rights is contained in the Vienna Declaration and Programme of Action from 1993 which states: "Human Rights are (…) indivisible, interdependent and

[48] The proposal for three generations of rights can be found in Karel Vasek, 'A 30-Year Struggle: The Sustained Efforts to give Force of Law to the UDHR' (1977) 30(11) UNESCO Courier 29.
[49] Van Boven (n 16) 173-188; An-Na'im (n 16); and Fredman, *Human Rights Transformed*… (n 37) 66-91.
[50] Khaliq and Churchill, 'The Protection of Economic and Social Rights: A Particular Challenge? (n 29).
[51] See Eide, 'Economic, Social and Cultural Rights as Human Rights' (n 17).

interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing and with the same emphasis (…)."[52] This viewpoint dates back to the 1948 United Nations (UN) resolution when UN Declaration of Human Rights was adopted. What is interesting is that this line of thinking was stated even when the UN General Assembly in the Separation Resolution decided to separate the rights and bring two covenants, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), 1966. However, both of these documents declare in their preambles that the full and equal enjoyment of all human rights is a prerequisite for all human rights. Later on, this viewpoint has been restated in the Proclamation of Teheran, adopted as the final act of the first international conference on human rights: "Since human rights and fundamental freedoms are indivisible, the full realization of civil and political rights without the enjoyment of economic, social and cultural rights is impossible. The achievement of lasting progress in the implementation of human rights is dependent upon sound and effective national and international policies of economic and social development."[53]

The next proclamation was the above quoted proclamation from the Vienna world conference and the Final Document from the 2005 World Summit reaffirmed this statement.[54] Again, in 2006 the UN General Assembly Resolution, when establishing the Human Rights Council, stated in the preamble "that all human rights are universal, indivisible, interrelated, interdependent and mutually reinforcing, and that all human rights must be treated in a fair and equal manner, on the same footing and with the same emphasis."[55] Despite all these proclamations, civil and political rights are still most often placed under a different document than economic and social rights and their compliance mechanism is almost never the same.

On the international level, the ICCPR has been ratified by all the major states except China showing that protection of civil and political rights is widely accepted worldwide.[56] It has a monitoring body, the Human Rights Committee (HRC), a body of

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[52] The Vienna Declaration and Programme of Action from 1993 (n 18) [5].
[53] Proclamation of Teheran (n 18) [13].
[54] 2005 World Summit Outcome (n 18) [121].
[55] Human Rights Council: resolution (n 18), preamble [3].
[56] UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171. See more on the webpage of the ICCPR: <http://www2.ohchr.org/english/law/ccpr.htm> accessed 13 July 2012; and in Sarah Joseph, Jenny

independent experts that monitors implementation of the ICCPR by its State parties. All States parties are obliged to submit regular reports to the HRC on how the rights are being implemented. States must report initially one year after acceding to the ICCPR and then whenever the HRC requests (usually every four years). The HRC examines each report and addresses its concerns and recommendations to the State party in the form of "concluding observations".

In addition to the Reporting procedure, Article 41 of the ICCPR provides for the HRC to consider inter-state complaints. The system of inter-state complaints operates on the basis of reciprocity. Furthermore, the First Optional Protocol to the ICCPR[57] gives the HRC competence to examine individual complaints with regard to alleged violations of the ICCPR by States parties to the Protocol.

On the other hand, the ICESR protects economic, social and cultural rights.[58] It is important to point out that the ICESCR has not been ratified by the United States of America (USA). There is a great reluctance of the USA towards giving economic and social rights legal status since it considers civil and political rights as the only "real" rights.[59] This approach is sometimes visible even with the states that have ratified the ICESCR, like the United Kingdom, on which the Committee on Economic, Social and Cultural Rights (CESCR) in its Observations in 1997, 2002 and 2009 stated that the Covenant has still not been incorporated into the domestic legal order and cannot be directly invoked before the courts. The CESCR also pointed out its regrets regarding the statement made by the UK's delegation that economic, social and cultural rights are mere principles and values and that most of the rights contained in the ICESCR are not

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Schultz and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* (2nd ed, OUP 2004).

[57] Optional Protocol to the International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 59, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 302, entered into force on March 23, 1976.

[58] UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3. See more on the webpage of the ICESCR: <http://www2.ohchr.org/english/law/cescr.htm> accessed 13 July 2012.

[59] Manisuli Ssenyonjo, *Economic, Social and Cultural Rights in International Law* (Hart Publishing 2009), 15; "Economic, Social and Cultural Rights are at best goals and not guarantees or entitlements, and the working of the free market is the best and fastest way to achieve these development goals." The US spokesperson in the Open-Ended Working Group on the Right to Development *Report of the Open-Ended Working Group on the Right to Development* 20 March 2001, UN Doc E/CN4/2001/26, p.46 [8]. See more in Philip Alston, 'Putting Economic, Social and Cultural Rights back on the Agenda of the United States' in William F. Schulz (ed), *The Future of Human Rights, U.S. Policy for a New Era* (University of Pennsylvania Press 2009).

justiciable.[60] Unlike the USA, the UK has accepted economic and social rights as actual rights and not only goals, however, it is argued by the UK government that they differ in nature form civil and political rights.[61]

The ICESCR, unlike the ICCPR, does not require states to take immediate steps regarding the full realisation of the rights contained in it, but it urges contracting parties to "take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognised in the present Covenant by all appropriate means, including particularly the adoption of legislative measures."[62] Therefore, unlike in the ICCPR, the realization of the rights enshrined in it is not immediate, but progressive. Despite this provision the CESCR has in its General Comments declared certain rights to be of immediate effect and in relation to other rights certain steps to begin to realise the right must be taken within a reasonable time of a state becoming a party to the ICESCR (see *infra* section 2.3.). As a monitoring body the IESCR has the CESCR which is a body of independent experts that monitors the implementation by its States parties. All States parties are obliged to submit regular reports to the CESCR on how the rights are being implemented. States must report initially within two years of accepting the ICESCR and thereafter every five years. The CESCR examines each report and addresses its concerns and recommendations to the State party in the form of "concluding observations".

In June 2008 the UN Human Rights Council adopted the Optional Protocol to the ICESCR[63] which provides for the CESCR to receive communications from individuals or groups claiming to be victims of any rights in the ICESCR. The Optional Protocol is not in force yet as it needs ten ratifications and so far it has obtained eight.[64]

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[60] CESCR, Concluding Observations: United Kingdom of Great Britain and Northern Ireland, May 2009, E/C.12/GBR/CO/5 [12] and [13]; CESCR, Report on the twenty-eight and twenty-ninth session, CESCR E/2003/22 [214]; CESCR, Report on the sixteen and seventeen sessions, CESCR E/1998/22 [293].

[61] The same approach is expressed by the Polish government. See CESCR, Fifth Periodic Report of the United Kingdom of Great Britain and Northern Ireland, UN Doc E/C.12/GBR/5 [71]- [75]; CESCR, Fifth Periodic Report of Poland, UN Doc E/C.12/POL/5; and CESCR, Concluding Observations: Poland, E/C.12/POL/CO/5, 2 December 2009 [8].

[62] ICESCR, Article 2(1).

[63] Optional Protocol to the International Covenant on Economic, Social and Cultural Rights adopted by the Resolution A/RES/63/117, on 10 December 2008.

[64] Spain, Slovakia, Mongolia, El-Salvador, Ecuador, Bosnia and Herzegovina, Bolivia and Argentina (on May 2012).

Therefore, the UN system has, in its main human rights instruments- the ICESCR and the ICCPR, strictly separated economic and social from civil and political rights, by protecting them within two different instruments and with two different monitoring bodies. The form of monitoring is the same, or at least it will be when the Optional Protocol to the ICESCR enters into force. Thus the crucial difference remains that rights in the ICCPR are of immediate application, whereas those in the ICESCR are progressive. It also needs to be pointed out that the Convention on the Rights of the Child, International Convention on the Elimination of All Forms of Racial Discrimination and the Convention on the Elimination of all Forms of Discrimination against Women contain both civil and political and economic, social and cultural rights. However, these examples do not undermine the dominant pattern of separation existent in the main UN human rights instruments, the ICCPR and the ICESCR.

Within the CoE system, civil and political rights are also separated from economic and social rights. The ECHR, a document on civil and political rights, consists of all 47 Member States of the CoE and all those states are now under the jurisdiction of the Court that can deliver binding judgments concerning those states. With economic and social rights the situation is somewhat different. Forty three Member States of the CoE have ratified either the Original or the Revised ESC. Ratification of the ESC does not oblige them to accept the jurisdiction of the ECSR in Collective Complaints procedure, as the ratification of the ECHR does for the jurisdiction of the Court. Ratification of the ESC only obliges states to make reports to the ECSR on their implementation of the accepted provisions of the ESC. It is left for the states to decide whether they accept the Collective Complaint procedure that authorises the ECSR to adopt decisions, which although not judicial, do have a quasi-judicial character. Unfortunately, up until October 2012 only 15 State parties to the ESC have accepted the Collective Complaints Protocol.[65] Furthermore, the ESC permits its State parties not to accept all the rights it contains. More details on both the ECHR and the ESC will be given in the following chapter, but what one can see is that the acceptance of regional supervision of civil and political rights is widely accepted, while the same cannot be said for economic and social rights. Both the ESC and the ECHR and their mechanisms for human rights protection will be further elaborated in the thesis.

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[65] Those are: Belgium, Bulgaria, Czech Republic, Croatia, Cyprus, Finland, France, Greece, Ireland, Italy, Netherlands, Norway, Portugal, Slovenia, and Sweden. It is interesting that the United Kingdom has not accepted the Collective Complaints Procedure which also shows its attitude towards the legal status of economic and social rights.

The Inter-American and the African regional systems will now be briefly presented.

The Inter-American system for the protection of human rights[66] is governed by three legal instruments: the Charter of the Organization of American States (the OAS Charter), the American Declaration of the Rights and Duties of Man and the American Convention on Human Rights (AmCHR) (with its additional Protocols). [67] In the human rights area the most important legal document, the one that constitutes a directly binding treaty, is the AmCHR.

The AmCHR was adopted in 1969 and it entered into force almost ten years later, in 1978. The same year when the AmCHR was adopted it was decided to establish the Inter-American Court of Human Rights (I-ACtHR), but the Court also came into effect in 1978 and began to operate when its Statute was established in the year 1980.[68] The AmCHR divides the protected rights into two categories under separate chapters, where chapter II declares civil and political rights and chapter III economic, social and cultural rights.[69] However, the AmCHR actually consists of mainly civil and political rights, since twenty three of the AmCHR's twenty four protected rights fall under the civil and political rights chapter. The AmCHR contains only reference to economic, social and cultural rights in Article 26. Furthermore, the structure of this Article clearly shows it is

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[66] For more on the Inter-American system and particularly on the protection of economic and social rights see Elizabeth Strenio, *The Inter-American Human Rights System* (Human Rights Education Association 2003); Ariel Dulitzky, 'The Inter-American System Fifty Years Later: Time for Changes' (2011) (special edition) Quebec Journal of International Law 127; Lax Lucas Lixinski, 'Treaty interpretation by the Inter-American Court of Human Rights: expansion at the service of the unity of international law' (2010) 21(3) E.J.I.L 585; Veronica Gomez, 'Economic, Social and Cultural Right in the Inter-American System' in Baderin and McCorquodale (eds) (n 4); Tara Melish, *Protecting Economic, Social and Cultural Rights in the Inter-American System: A Manual on Presenting Claims* (Orville H. Schell Jr. Center for International Human Rights, Yale Law School and Centro de Derechos Economicos y Sociales, Ecuador 2002); and Monica Feria Tinta, 'Justiciability of Economic, Social and Cultural Rights in the Inter-American System of Protection of Human Rights: Beyond Traditional Paradigms and Notions' (2007) 29 Hum. Rts. Q. 433.

[67] Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, "Protocol of San Salvador", O.A.S. Treaty Series No. 69 (1988), entered into force November 16, 1999, reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 67 (1992) and the Protocol to the American Convention on Human Rights Relative to the Abolition of Death Penalty (1990) O.A.S. Treaty Series No. 73 (1990), not in force yet.

[68] See more on the web page of the Inter-American Human Rights System at <http://www.hrea.org/index.php?doc_id=413> accessed 13 July 2012. Also see Melish (n 66), 10-14; Ramirez Cleves, G.A., 'The Interamerican system for the protection of human rights and a reflection of the Colombian situation', at: <http://www.eplo.eu/alfaII/docs/The%20Interamerican%20System%20for%20the%20Protection%20of%20Human%20Rights,%20and%20a%20Reflection%20of%20the%20Colombian%20Situation.pdf> accessed 13 July 2012, pp. 3-4; David Marcus, 'The Normative Development of Socioeconomic Rights through Supranational Adjudication' (2006) 42 StanJIntL 53, 80-84.

[69] American Convention on Human Rights, O.A.S.Treaty Series No. 36, 1144 U.N.T.S. 123, entered into force on 18 July 1978, reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 25 (1992).

not intended for protection on the same level as civil and political rights since it urges states "to adopt measures…with a view of achieving progressively… the full realization of the rights."[70]

The primary organs of the Inter-American human rights system are the Inter-American Commission on Human Rights (I-AComHR) and the I-ACtHR.

The Additional Protocol in the Matter of Economic, Social and Cultural Rights (Protocol of San Salvador) has been adopted and its aim is to fill in the gap from the AmCHR regarding economic and social rights. The Protocol has been ratified by only 15 of the 24 parties to the AmCHR. It was designed to change the situation with economic, social and cultural rights within the AmCHR system. However, under Article 19(6) of the Protocol the only right to organize trade unions (as set out under Article 8(1)(a)) and the right to education (as set out under Article 13) are subject to the contentious jurisdiction of the I-ACtHR and the I-AComHR. The judicial protection of economic and social rights is still largely underdeveloped and the Inter-American judicial protection of economic and social rights has not generally involved express reliance upon, and enforcement of, economic and social rights under the AmCHR, its Protocols and the American Declaration of the Rights and Duties of Man.[71]

The African human rights system is the newest regional system and it is considerably less developed than the American and the European systems. It is based on the AfCHPR (or Banjul Charter),[72] which entered into force in October 1986. Today, the AfCHPR has been ratified by all fifty-three members of the Organisation of African Union (OAU).[73] In June 1998, the OAU adopted the Protocol to the African Charter on Human and Peoples'

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[70] Article 26 of the AmCHR.

[71] For the opportunities on judicial and other types of protection of socio-economic rights within the Inter-American system see: Melish (n 66), 41-52. Also in its case-law on the rights indigenous people the I-ACtHR has interpreted various civil and political rights (like the right to life) to give protection to a range of socio-economic rights and interests (like the right to food, the right to education and the right to health care). See *Xákmok Kásek Indigenous Community v Paraguay*, Judgment of 24 August 2010, Series C No. 214.

[72] The African Charter on Human and Peoples' Rights, June 27, 1981, OAU Doc. CAB/LEG/67/3/Rev.5 (1981).

[73] The African Charter was adopted in 1981 by the 18th Assembly of Heads of State and Government of the OAU, the official body of the African states. The Organisation of African Unity (OAU) was established on 25 May 1963 in Addis Ababa, on signature of the OAU Charter by representatives of 32 governments.

Rights on the Establishment of an African Court on Human and Peoples' Rights.[74] The OAU was transformed in 2002 into the African Union (AU).[75]

The African Charter on Human and Peoples' Rights (AfCHPR) has specific characteristics that distinguish it from the AmCHR and ECHR in order to satisfy the specific needs of Africa. First of all, the AfCHPR reflects the wish of Member States of the OAU to maintain their distance from both the East and the West in their conception of the ideological function of human rights. Furthermore, the AfCHPR adopts a dialectic approach by correlating rights with corresponding duties. Also, according to the AfCHPR, the realization of individual rights can find its fullest expression and fulfilment only within the context of the community. And finally, the AfCHPR adopted an integrated approach to human rights, placing the recognition of economic, social and cultural rights on the same footing as civil and political rights.[76]

The institutional framework concerning human rights of the AU consists of the assembly of Heads of State and Government which is the supreme organ of the AU. Furthermore, there are the African Commission on Human and Peoples' Rights (AfComHR) and the African Court on Human and Peoples' Rights (AfCtHPR).

The AfCtHPR has the competence to take final and binding decisions on human rights violations. Currently there are twenty six AU Member States that have ratified the Protocol establishing the Court.[77] Despite the AfCtHPR, the AfComHPR still remains important in the individual complaints process since it has the role of taking the case to the AfCtHPR (only the AfComHPR and the States have automatic *locus standi* before the AfCtHPR). The AfComHPR has, through its work, even read certain economic and social rights into the AfCHPR, like the right to adequate housing and the right to

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[74] Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, Assembly of Heads of State and Government of the Organization of African Unity, Ougadougou, Burkina Faso, June 1998, OAU/LEG/MIN/AFCHPR/PROT.(1) Rev.2.
[75] Constitutive Act of the African Union, CAB/LEB/23.15 (26 May 2001).
[76] B. Obinna Okere 'The Protection of Human Rights in Africa and the African Charter on Human and Peoples' Rights: A Comparative Analysis with the European and American System' (1984) 6 Hum. Rts. Q. 141, 145. See more in Vincent O. Orlu Nmehielle *The African Human Rights System, Its Laws, Practice, and Institutions* (Martinus Nijhoff Publishers 2001); Cristof Heyns 'The African Regional Human Rights System: The African Charter' (2003-2004) 108 Penn St. L. Rev. 679; and Makau W. Mutua 'The African Human Rights Court: A Two-Legged Stool?' (1999) 21 Hum. Rts. Q. 342.
[77] AfCtHPR <http://www.african-court.org/en/> accessed 13 July 2012.

health.[78] On the other hand, up until May 2012 there have not been many judgments of the AfCtHPR, and in most of them it found it has no jurisdiction to hear the case.[79]

Therefore, although the interconnection and indivisibility of all human rights has been stressed from the very beginning of human rights discussion, in practice they have, at least so far, not been equally protected. As expressed by Antonio Cassese, "this convenient catch-phrase serves to dampen the debate while leaving everything the way it was."[80] Despite the proclamations of their indivisibility, they are far from being indivisible on a regional or on a global level.

2.3 DIFFERENCES BETWEEN CIVIL AND POLITICAL AND ECONOMIC, SOCIAL AND CULTURAL RIGHTS - ARE THERE ANY?

It is evident from the previous section that generally civil and political rights enjoy better legal protection and are more accepted within states as being justiciable. Nevertheless, although differences between economic and social and civil and political rights still exist, they are not nearly as sharp and clear as they were believed to be at the beginning of the international human rights era.

The first idea of traditionalists in separating economic and social from civil and political rights arose from the thought of civil and political rights as negative in their nature while of economic and social rights as positive. The negative character of rights means that they do impose negative obligations on states, and negative obligations require Member States to refrain from action, while positive to take some action. The division on civil and political rights as imposing only negative obligations and economic and social rights as imposing only positive, is nowadays completely abandoned. Most civil and political rights, in order to be effective, also require some positive state action and fifty years of

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[78] See *SERAC & CESR v Nigeria*, Com. No. 155/96 (2001) [60]; African Commission on Human and Peoples' Rights Principles and Guidelines on the Implementation on Economic, Social and Cultural Rights in the African Charter on Human and Peoples Rights (November 2010) [77] on the right to housing; and *Purohit and Moore v the Gambia*, Com. No. 241/2001 (2003) AHRLR 96 (where the AfComHR stated that the Gambia did not satisfy Articles 16 and 18(4) of the AfCHPR and that enjoyment of the right to health is crucial to the realisation of other fundamental rights and freedoms and includes the right of all to health facilities, as well as access to goods and services, without discrimination of any kind).

[79] Judgments and Orders of the Court are available on the AfCtHPR website (n 77).

[80] Antonio Cassese, 'Are Human Rights Truly Universal?' in Obrad Savić (ed) *The Politics of Human Rights* (Verso 1999), 159.

jurisprudence of the ECtHR clearly confirms this. Just a superficial look at the rights contained in the ECHR as protected by the Court shows that most civil and political rights entail some positive obligation on the states.[81] Even the rights that are construed negatively, like the right not to be subjected to torture, require numerous positive actions from the states, like to protect vulnerable persons from ill-treatment by others[82] or to provide healthcare in detention[83]. While admittedly economic and social rights often require relatively greater state action[84] for their realisation than do civil and political rights, this difference separates the two sets of rights more in terms of degree than in kind.[85]

With the above stated division came another often made distinction; that civil and political rights are resource free, whereas economic and social rights or their implementation is resource dependent. However, whether or not a right is cost-free will depend on the obligation in question, rather than the classification of the right imposing that obligation as either civil and political or economic and social in nature.[86] It is true that economic and social rights are often more financially demanding than civil and political rights (but not always, e.g. requiring the private sector to provide equal pay for equal work), but we can in no way say that civil and political rights are resource free.[87]

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[81] For example see *Airey v Ireland* (n 3) concerning Article 6(1) of the Convention, access to a court where the Court found a violation of this rights because of the state's failure to provide Mrs Airey with legal aid ; *Christine Goodwin v United Kingdom* (2002) 35 E.H.R.R. 447 regarding official recognition of transsexuals where the Court found that a state has an obligation to provide effective legal recognition of the new-identities of post-operative transsexuals; *Dougoz v Greece* (2002) 34 E.H.R.R. 61 regarding unsatisfactory detention conditions the Court found a violation of Article 3 due to the state's failure to provide for satisfactory conditions of detention; *Lopez Ostra v Spain* (1995) 20 E.H.R.R. 513 regarding failure of the authorities to adequately protect the applicant's home and family life from gases emitted by a waste treatment plant, the Court found a violation of Article 8; *Marckx v Belgium* (1979-1980) 2 E.H.R.R. 330 regarding the duty upon states to provide for the legal recognition of the relationship between a parent and her (illegitimate) child and the parent's family where the Court found a violation of Article 8; *Osman v United Kingdom* (2000) 29 E.H.R.R. 245 where the Court did not find a violation of Article 2 but emphasized positive obligations states have in order to provide persons with suitable measures of protection against threats to their lives from third persons; and numerous other cases, some of which will be presented in the thesis. Also see Mowbray, *The Development of Positive Obligations*… (n 23).

[82] *Z. v United Kingdom* (2002) 34 E.H.R.R. 3.

[83] *Keenan v United Kingdom,* (2001) 33 E.H.R.R. 38.

[84] Although, some economic and social rights are purely negative, like the right to belong to a trade union and for a trade union to carry out its activities. (ICESCR, Article 8).

[85] Philip Alston and Gerard Quinn, 'The Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights' (1987) 9 Human Rights Quarterly 156, 183-4.

[86] Nolan, Porter and Langford (n 30), 8.

[87] For example, even the quintessential civil and political rights, the right to a fair trial, has budgetary implications: *Airey v Ireland* (n 3) [26] (where the Court said Ireland must either provide legal aid or simplify court proceedings) or Article 6(3)(e) of the Convention guaranteeing the right to a free assistance

The third division is that economic and social rights are to be achieved progressively, while civil and political rights are subject to immediate implementation. This viewpoint is confirmed in the in Article 2(1) of the IECSR.[88]

However, despite this provision the CESCR has in its General Comments declared certain rights to be of immediate effect. For example, in General Comments No. 3 and 9 it has stated that it considers many of the provisions in the Covenant to be capable of immediate implementation[89] and in General Comments No. 3 it has, regarding all the ICESR rights, stated that regardless of the state of development of any country, there are certain steps which must be taken immediately.[90]

The idea that economic and social rights may be of immediate effect was also accepted and affirmed in 1986 by the Limburg Principles on the Implementation of the International Covenant on the Economic, Social and Cultural Rights:

"The obligation 'to achieve progressively the full realization of the rights' requires States parties to move as expeditiously as possible towards the realization of the rights. Under no circumstances shall this be interpreted as implying for States the right to defer indefinitely efforts to ensure full realization. On the contrary all States parties have the obligation to begin immediately to take steps to fulfil their obligations under the Covenant."[91]

As to the ESC, the rights found there are in general not progressive in nature, but are of immediate effect. The ECSR has taken the approach under which it requires states to take immediate steps in order to implement its decisions in respect of collective complaints and conclusions regarding national reports. For example, in its Conclusion 2003-1 on France on reducing homelessness the ECSR stated that it requires "the

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of an interpreter if a person charged with a criminal offence cannot understand or speak the language used in court.

[88] See n 62.

[89] CESCR, General Comment No. 3 (1990) E/1991/23: "Article 2 is of particular importance to a full understanding of the Covenant and must be seen as having a dynamic relationship with all of the other provisions of the Covenant...Thus while the full realization of the relevant rights may be achieved progressively, steps towards that goal must be taken within a reasonably short time after the Covenant's entry into force for the States concerned."[1]-[2]; CESCR, General Comment No. 9 (1998) E/C.12/1998/24 "The Committee has already made clear that it considers many of the provisions in the Covenant to be capable of immediate implementation. Thus, in General Comment No. 3 it cited, by way of example, articles 3; 7, paragraph (a) (i); 8; 10, paragraph 3; 13, paragraph 2 (a); 13, paragraph 3; 13, paragraph 4; and 15, paragraph 3." [10]

[90] CESCR, General Comment No. 3 (n 89) [2] and [9].

[91] The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, UN Commission on Human Rights, *Note verbale dated 86/12/05 from the Permanent Mission of the Netherlands to the United Nations Office at Geneva addressed to the Centre for Human Rights ("Limburg Principles")*, 8 January 1987, E/CN.4/1987/17, [21].

introduction of measures, such as provision of immediate shelter and care for the homeless and measures to help such people overcome their difficulties and prevent a return to homelessness."[92] The same was restated in the Decision on the merits regarding Collective Complaint No. 39/2006.[93]

However, the ESCR has on certain occasions accepted the progressive nature of economic and social rights and made clear it holds that the realisation of certain fundamental economic and social rights recognised by the ESC is guided by the principle of progressiveness.[94]

The I-AComHR has also emphasized the duty to take immediate steps towards the realisation of economic and social rights, stating that:

"The principle that economic, social and cultural rights are to be achieved progressively does not mean that governments do not have the immediate obligation to make efforts to attain the full realization of these rights. The rationale behind the principle of progressive rights is that governments are under the obligation to ensure conditions that, according to the state's material resources, will advance gradually and consistently toward the fullest achievement of these rights...

It therefore follows that the obligation of member states to observe and defend the human rights of individuals within their jurisdictions, as set forth in both the American Declaration and the American Convention, obligates them, regardless of the level of economic development, to guarantee a minimum threshold of these rights."[95]

Although we might agree with the statement that on most occasion's civil and political rights can be achieved within the stricter time limit than economic and social rights, the fact is that both groups of rights can sometimes be realised immediately or at least impose obligations on states to start immediately with their realisation.

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[92] ESC (Revised), ECSR Conclusions 2003 Volume 1 (Bulgaria, France, Italy) (CoE Publishing 2003), 226.
[93] *European Federation of National Organisations Working with Homeless (FEANTSA) v France* (39/2006), (2008) 47 E.H.R.R. SE15, [103].
[94] *Centre on Housing Rights and Evictions (COHRE) v Italy* (58/2009), (2011) 52 E.H.R.R. SE6 [26]; *International Association Autism-Europe v France* (13/2002), (2004) 11 I.H.R.R. 843 [53]. See also *General Federation of employees of the national electric power corporation (GENOP-DEI)* and *Confederation of Greek Civil Servants' Trade Unions (ADEDY) v Greece* (66/2011), decision on the merits of 23 May 2012 where the ESCR recognised the economic crisis which the Greece is facing, but still emphasized that measures introduced to consolidate public finances should not undermine the core framework of a national social security system [47]. Therefore, the economic crises will not be sufficient argument for non-compliance with the obligations under the ECSR.
[95] Inter-Am.Comm.H.R., ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, 1993, OAE/Ser.L/V/II.85 Doc.9 rev (11 February 1994), Chapter VII 'The principle of progressive realisation'.

The fourth often used argument is that economic and social rights are too vague for judicial enforcement, while civil and political rights are determinate. Linked to this argument is the argument of justiciability of economic and social rights. An interesting view on this issue has been given by D. Marcus who wrote that the perception of non-justiciability and the normative underdevelopment of economic and social rights act as co-dependent parts of a negative feedback mechanism: "States oppose adjudication because the rules of decision are vague and imprecise, and these characteristics prevent the application of the "judicial craft" to clarify and develop their content."[96]

It is true that many of the rights contained in the ICESCR are formulated quite broadly, like the right to social security that only says: "The State parties to the present Covenant recognize the right of everyone to social security, including social insurance"[97] or the right to work as guaranteed under Article 6 (1).[98] However, not all rights under the ICESCR are formulated so vaguely and broadly, like the right to primary education as guaranteed under Article 13(2)(a).[99] Also, the fact that rights are formulated vaguely does not automatically mean that they cannot be defined so that the states know what their obligations are. Regarding ICESCR the main guidance are General Comments adopted by the CESCR,[100] which although not legally binding are not without legal significance. Some of them can even be considered as interpretations of the ICESCR.[101]

As to the ESC, many of its provisions are drafted in sufficiently precise terms to be judicially enforceable.[102] Furthermore, the ECSR has through its decisions on collective complaints[103] and conclusions[104] on national reports very clearly stated the obligations of the states regarding certain provisions of the ESC.

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[96] Marcus (n 68), 55.
[97] IECSR, Article 9.
[98] IECSR Article 6(1): 'The States parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right'.
[99] "The States Parties to the present Covenant recognize that, with a view to achieving the full realization of this right: (a) Primary education shall be compulsory and available free to all."
[100] See CECSR, General Comment No. 18 (2005) E/C.12/GC/18 on the Right to work.
[101] Khaliq and Churchill, 'The Protection of Economic and Social Rights: A Particular Challenge?' (n 29), 5.
[102] Khaliq and Churchill, 'The European Committee of Social Rights: putting flesh…' (n 29), 430. See Article 8(1), (2) and (5) of the Revised ESC on the right of employed women to protection of maternity.
[103] See *Marangopoulos Foundation for Human Rights (MFHR) v Greece* (30/2005), (2007) 45 E.H.R.R. SE11, on the obligation of the State to adequately prevent the impact for the environment or to develop an appropriate strategy in order to prevent and respond to the health hazards for the population; or *European Roma Rights Centre (ERRC) v Bulgaria* (31/2005), (2008) 46 E.H.R.R. SE10 on the obligation of the state to provide adequate housing for Roma people.

As we will also see through this thesis, most civil and political rights in the ECHR are also in no way determinate and conclusive, but through numerous interpretative methods the ECtHR has given meaning to these rights. On the other hand, the ECSR members are also entitled to use (and they often do) the same interpretative methods as the Court and thereby determine the meaning of rights contained in the ESC. "There are strong arguments in favour of open-textured framing of all human rights, so that courts are able to respond adequately to individual circumstances and historical developments in concretising their meaning over time."[105]

Finally, the issue of justiciability of economic and social rights has been debated a lot during the last 15 years, and most authors will nowadays agree that judicial protection of economic and social rights is possible.[106] Part of the concern was that adjudicating economic and social rights issues is beyond the institutional capacity of the courts. In the paper *The Justiciability of Social and Economic Rights: An Updated Appraisal* A. Nolan, B. Palmer and M. Langford broke this assertion into four primary claims: (i) that the courts lack the information required to deal with social and economic rights; (ii) that the judiciary lacks the necessary expertise, qualification or experience to deal with social and economic rights issues; (iii) that the courts are incapable of dealing successfully with 'polycentric' tasks, such as those entailed by adjudication involving social and economic rights; and (iv) that the courts lack the necessary tools and remedies to deal effectively with social and economic rights. Further on in the text they have elaborated arguments against this assertion, claiming that the courts do have the necessary capacity to adjudicate economic and social rights.[107]

Acceptance of the justiciability of economic and social rights on the international plane is shown by a number of developments. The CESCR has asserted the justiciability of rights contained in the ICESCR both in its General Comments[108] and in some of its

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[104] See ESC, ECSR Conclusions XVII- 2, Volume 1 (Austria, Belgium, Czech Republic, Denmark, Finland, Germany, Greece, Hungary, Iceland) (CoE Publishing 2005); and ESC (Revised), ECSR Conclusions 2007- Volume 1 (Albania, Armenia, Belgium, Bulgaria, Cyprus, Estonia, Finland, France) (CoE Publishing 2007).
[105] Nolan, Porter and Langford (n 30), 11.
[106] Melish (n 66), 33-40; Marcus (n 68); Ellen Wiley, 'Aspirational Principles of Enforceable Rights? The Future for Socio-economic Rights in National Law' (2006-2007) 22 Am. U. Int'l L. Rev. 35; Mashood A. Baderin and Robert McCorquodale, 'The International Covenant on Economic, Social and Cultural Rights: Forty Years of Development' in Baderin and McCorquodale (eds) (n 4) 12.
[107] See Nolan, Porter and Langford (n 30), 15-18.
[108] CESCR, General Comment No. 3 (n 89) [5] and General Comment No. 9 (n 89) [10].

Statements.[109] Also, as already mentioned in June 2008 UN Human Rights Council adopted the Optional Protocol to the ICESCR,[110] which provides for the CESCR to receive communications from individuals or groups claiming to be victims of any rights in the ICESCR.

The ECSR has established a quasi-judicial procedure under the Collective Complaints Protocol. Although under this Protocol the ECSR does not have the power to deliver binding judgments, it has through a number of decisions (some of which will be presented later) clearly shown that economic and social rights are capable of legal enforcement. The I-AComHR and the I-ACtHR have also confirmed the justiciability, albeit limited, of Article 26 of the AmCHR guaranteeing economic and social rights.[111] Finally, as already stated, the African system, at least in theory, makes no difference in justiciability of civil and political and economic and social rights.[112]

2.4 TRIPARTITE TYPOLOGY OF OBLIGATIONS

The classical division on civil and political rights as negative rights that impose on the state only the duty to avoid depriving, and occasionally to protect from deprivation, and on economic and social rights as the ones that impose duties to protect from deprivation and to aid the deprived is nowadays rather abandoned. Today mostly accepted is the H. Shue's idea that for every basic right there are three types of correlative duties.[113] After H. Shue, A. Eide, as the Rappourteur to the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities divided all human rights as to whether they impose obligations to *respect, protect* or *fulfil*. He described them where the obligation to *respect* requires states to abstain from violating a right; the obligation to *protect* requires states to prevent third parties from violating that

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[109] Statement to the Convention to draft a Charter of Fundamental Rights of the European Union <www2.ohchr.org/english/bodies/cescr/docs/statements/EU.doc> accessed 13 July 2012.
[110] Optional Protocol to the ICESCR (n 63).
[111] *Ivanildo Amaro da Silva et al. v Brazil*, Case 1198-05, Report No. 38-101, Inter-Am.C.H.R., OEA/Ser.L/V/II. Doc. 5, rev. 1 (2010) [26], [41]; *Acevedo Buendia et al v. Peru* (I-ACtHR), 1 July 2009, [92]-[107].
[112] See *Principles and Guidelines on the Implementation on Economic, Social and Cultural Rights in the African Charter on Human and Peoples Rights* (n 78).
[113] Shue (n 17), 52. Shue does not believe there are distinctions between rights, but only distinction between duties. For him, the complete fulfilment of each kind of right involves the performance of multiple kinds of duties, that is- for every basic right there are three types of duties. Therefore, Shue rejected the notion that rights can be divided into negative and positive ones.

right; and the obligation to *fulfil* requires the state to take measures to ensure that the right is enjoyed by those within the state's jurisdiction.[114]

Therefore, both Eide and Shue made no distinction among rights, but among duties. This tripartite typology of obligations has also been applied by the CESCR in General Comments[115] and the AfComHPR in its decision *Social and Economic Action Centre (SERAC) and Another v Nigeria (2000)*[116] and in African Commission Principles and Guidelines on the Implementation on Economic, Social and Cultural Rights in the African Charter on Human and Peoples Rights, as well as in Maastricht Guidelines on Violations of Economic, Social and Cultural Rights.[117]

The obligation to respect requires from the state not to interfere with the enjoyment of the guaranteed human right. This obligation applies to all human rights, civil and political and economic and social. Fulfilment of the obligation to respect usually does not include large financial burden on states, and judgments concerning violations of these obligations should be suitable for immediate implementation. It is considered that more often civil and political rights will place this obligation on states, since most of civil and political rights are construed in a way that they primarily place an obligation on the state not to interfere. One example may be Article 3 of the ECHR stating 'No one shall be subjected to torture or inhuman or degrading treatment'. The same goes for Article 2 that prohibits states to intentionally deprive someone of their life or Article 8 that guarantees everyone the right to respect for his private and family life, his home and his correspondence which are construed in a way that they primarily impose obligations to respect.

However, not only civil and political rights place obligations on the state to respect but economic and social rights also require non-interference by the state. For example, states are under the obligation to respect the right to health by refraining from denying or limiting equal access for all persons, including prisoners or detainees, minorities,

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114 Eide, *The Right to Adequate Food*… (n 17), 23-24.
115 CESCR, General Comment No. 21 (2009) E/C.12/GC/21, [48]; General Comment No. 19 (2008) E/C.12/GC/19, [43]-[51]; General Comment No. 18 (n 100), [22]-[28]; General Comment No. 17 (2005) E/C.12/GC/17, [28]-[34]; General Comment No. 16 (2005) E/C.12/2005/4, [17]-[22]; General Comment No. 15 (2005) E/C.12/2002/11, [20]-[29]; General Comment No. 14 (2000) E/C.12/2000/4, [33]-[38]; General Comment No. 13 (1999) E/C.12/1999/10, [46]-[48].
116 *Social and Economic Action Centre (SERAC) and Another v Nigeria* (2000) AHRLR 23 (ACHPR 1995) [44].
117 Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, Maastricht, 22-26 January 1997, <http://www1.umn.edu/humanrts/instree/Maastrichtguidelines_.html> accessed 13 August 2012.

asylum seekers and illegal immigrants, to preventive, curative and palliative health services; abstaining from enforcing discriminatory practices as a state policy; and abstaining from imposing discriminatory practices relating to women's health status and needs.[118]

The obligation to protect imposes some positive obligations on states, since the state not only has to refrain from acting, but is also required to protect individuals from having their rights interfered with by third (i.e. non-state) parties.[119] Although an obligation to protect has within classical theoretical divisions been more attributed to economic and social rights, the HRC, the Court and the I-ACtHR have through their interpretation also imposed the obligation to protect on civil and political rights.

The HRC in its General Comment No. 20 concerning the prohibition of torture and cruel treatment or punishment stated:

"It is the duty of the State party to afford everyone protection through legislative and other measures as may be necessary against the acts prohibited by article 7, whether inflicted by people acting in their official capacity, outside their official capacity or in a private capacity. The prohibition in article 7 is complemented by the positive requirements of article 10, paragraph 1, of the Covenant, which stipulates that "All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person."[120]

As to the Court, numerous cases where the Court interpreted the ECHR as to give rise to obligations to protect will be presented in the following chapters. To give here just few examples, under Article 8 of the ECHR, the Court has on numerous occasions gone beyond the notion to respect requiring the states to protect individuals' rights guaranteed under Article 8. Here, the states have had to protect persons under their jurisdiction by changing legislation,[121] to protect the applicants' private life from environmental hazards,[122] or they have had an obligation to protect the right to home by

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[118] CESCR, General Comment No. 14 (n 115), [34].
[119] *See* Nolan 'Addressing economic and social rights violations…' (n 31).
[120] HRC, General Comment No. 20: Replaces general comment 7 concerning prohibition of torture and cruel treatment or punishment (Article 7), Forty-fourth session, 1992, U.N. Doc. HRI/GEN/1/Rev.1 at 30 (1994) [2].
[121] *X and Y v Netherlands* (1986) 8 E.H.R.R. 235.
[122] *Lopez Ostra v Spain* (n 81).

preventing evictions without sufficient (procedural) safeguards, all in relation to acts by private parties.[123]

With the I-ACtHR this approach is visible in *Velasquez Rodriguez v Honduras* where the I-ACtHR stated that the State has a legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation. It also emphasized that an illegal act which violates human rights and which is initially not directly imputable to a State can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the AmCHR.[124]

Regarding economic and social rights, in General Comment No. 18, concerning the obligation to protect the right to work, the CESCR stated that it includes, *inter alia*, the duties of States parties to adopt legislation or to take other measures ensuring equal access to work and training and to ensure that privatization measures do not undermine workers' rights.[125]

On a regional level, the ECSR has also emphasized an obligation of the state to protect, both in its conclusions and in its decisions. For example, in its Conclusions XIV- 2 (1998) on Malta it emphasized that it has found no information on specific measures (prohibition, protective equipment, permissible maximum exposure levels, etc.) taken to protect workers against dangers associated with hazardous biological agents, carcinogenic agents, ionising radiation or asbestos.[126] In its decision on the merits in Collective Complaint 30/2005 the ECSR pointed out that with a view of ensuring the effective exercise of the right to a healthy environment within the right to health, Article 11 of the ECSR requires States parties to protect public health against air pollution resulting from the actions of private enterprises. [127]

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123 *McCann v United Kingdom* (2008) 47 E.H.R.R. 40; *Yakovenko v Ukraine* App no 15825/06 (ECtHR, 25 January 2008).
124 *Velasquez Rodriguez v Honduras* Inter-AmCtHR (Series C) No 4 (1988) [166]-[176].
125 CESCR General Comment No. 18 (n 100), [25].
126 ESC, Committee of Independent Experts Conclusions XIV-2 Volume 2 (Italy, Luxembourg, Malta, Netherlands, Norway, Portugal, Spain, Sweden, Turkey, United Kingdom) (CoE Publishing 1998), 505.
127 *Marangopoulos Foundation for Human Rights v Greece* (n 103), [93]; See also *International Commission of Jurists v Portugal* (1/1998), decision on the merits of 10 September 1999, where the ECSR concluded that the

Finally, the obligation to fulfil requires states to adopt measures to ensure the goal of the full realisation of rights to those who cannot secure rights themselves.[128] The obligation to fulfil is attributed mainly to economic and social rights, it is financially demanding, and usually the obligation itself is vague and unclear.[129] As will be shown, regarding the imposition of the obligation to fulfil, the reluctance of the judiciary to decide on these matters is most apparent. The CECSR has adopted a three-fold classification and divided the obligation to fulfil economic, social and cultural into the obligation to facilitate, promote and provide. The obligation to facilitate requires states, *inter alia*, to take positive measures that enable and assist individuals and communities to enjoy rights while the obligation to promote requires states to undertake actions that create, maintain and restore the realisation of all rights. Finally, the obligation to provide rights arises when individuals or groups are unable, on grounds reasonably to be beyond their control, to realise these rights themselves, with the means at their disposal. [130]

The ECSR has on numerous occasions stressed the obligation of State parties to promote, facilitate and to provide. In its Conclusion 2010 on Sweden regarding Article 26 it asked that the next report contains a short description of the active measures taken by the government alone or in co-operation with employers and workers' organisations to promote awareness, information and prevention of moral harassment in the workplace.[131] In Collective Complaint No. 52/2008 the ECSR recalled that in order to satisfy Article 16 of the ESC, states must promote the provision of an adequate supply of housing for families, take the needs of families into account in housing policies and ensure that existing housing be of an adequate standard and size considering the

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satisfactory application of Article 7 cannot be ensured solely by the operation of legislation if this is not effectively applied and rigorously supervised. [32].

[128] Ssenyonjo (n 59), p 25.

[129] Van Hoof talks about two obligations, instead of the obligation to fulfil and those are: obligation to ensure and the obligation to promote. They differ in the sense that the obligation to ensure encompasses an obligation for the state to create conditions aimed at the achievement of certain results, while an obligation to promote is also designed to achieve a certain result, but it concerns more or less vaguely formulated goals. G.J.H. van Hoof, 'The Legal Nature of Economic, Social and Cultural Rights. A Rebuttal of Some Traditional Views' in Phillip Alston and Katarina Tomaševski (eds), *The right to food* (Martinus Nijhoff Publishers 1984), 106.

[130] CESCR, General Comment No. 14 (n 115) [37]; General Comment No. 15 (n 115) [25]; General Comment No. 17 (n 115) [34]; General Comment No. 18 (n 100), [26]-[28]; General Comment No. 19 (n 115), [47]-[50]; General Comment No. 21 (n 115), [51]-[54]. See also Ssenyonjo (n 59), 25.

[131] ESC (Revised), ECSR, Conclusions 2010- Volume 2 (Lithuania, Malta, Moldova, Netherlands, Norway, Portugal, Romania, Slovenia, Sweden, Turkey, Ukraine) (CoE Publishing 2011), 585.

composition of the family in question, and include essential services, meaning that the state has an obligation to provide for those means.[132]

Instruments on civil on political rights generally do not place obligations on states to fulfil nor do their monitoring bodies interpret the provisions contained in them in such way. [133] However, the Court judges have entered this sphere, for example by placing an obligation on states to provide for detention centres of certain standards[134] or to provide for medical treatment.[135]

It might be true that both civil and political rights and economic and social rights entail all three obligations for the state and that all three types of obligations have budgetary implications but the fact is that the obligation to fulfil tends to be the "most resource demanding, and often also the one that raises most questions as regards a precise description of the obligation"[136] and most attributable to economic and social rights.

2.5 CONCLUSION

In this chapter the theoretical approaches to civil and political rights and economic and social rights have been analysed together with their placement in the main regional and global human rights instruments. The conclusion that can be reached is that nowadays the classic division between civil and political rights as negative, subject to immediate implementation, justiciable and resource free, and economic, social and cultural rights as positive, progressive, non-justiciable and financially demanding, is not sustainable. With all the developments in human rights protection, particularly on the global and regional level, we can say that both civil and political and economic and social rights can place

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132 *Centre on Housing Rights and Evictions (COHRE) v Croatia* (52/2008), (2011) 52 E.H.R.R. SE8, [65].
133 Although it is not always easy to discern the dividing line between the obligation to protect and obligation to fulfil. See *Lopez Ostra v Spain* (n 81) discussed in chapter V, Section 5.2.
134 *Kehayov v Bulgaria* App no 41035/98 (ECtHR, 18 January 2005); *Orchowski v Poland* App no 17885/04 (ECtHR, 22 October 2009); *Kalashnikov v Russia* (2003) 36 E.H.R.R. 34.
135 *D. v United Kingdom* (1997) 24 E.H.R.R. 423. *D.* is not directly about providing medical treatment, but by preventing D., from being expulsed from the UK, the Court impliedly placed an obligation to the UK to provide him with the medical treatment. Also, there are numerous examples where the state was under an obligation to provide for the medical treatment of prisoners (see chapter IV, Section 4.6.).
136 Ida Elisabeth Koch, 'The Justiciability of Indivisible Rights' (2003) 72 Nordic Journal of International Law 3, 12.

both negative and positive obligations on states and financial burdens, as well as being justiciable. Furthermore, both civil and political rights and economic and social rights can give rise to three different types of obligations: to respect, to protect and to fulfil. However, the implementation and execution of these two groups of rights is still under most human rights instruments somewhat different and separate.

The fact is that a black-white distinction between economic and social and civil and political rights is not possible. However, there still are certain differences among those two categories of rights that cannot be ignored. Those differences do not mean that economic and social rights do not deserve legal protection. Whether the protection attributed to economic and social rights in a certain regional (or in the global) system will be judicial or quasi-judicial should be left to the system itself to determine. However, in Europe a decision has been made to have separate mechanisms.

Within the CoE a proposal to add a Protocol to the European Convention on economic and social rights was rejected by the CoE bodies,[137] showing that there is still a desire for separate protection of economic and social rights in Europe. In his Opinion regarding the Additional Protocol to the European Convention on Human Rights concerning fundamental social rights, Mr Erik Jurgens pointed out:

"However, recognising the indivisibility of human rights does not — for a number of reasons — mean that we should seek to make a single institution (namely the European Court of Human Rights) responsible for guaranteeing them all. On the one hand, imposing a further burden on the European Court of Human Rights at a time when it is just beginning to function and has many new members who need to familiarise themselves with new procedures and working methods could threaten its very existence.

On the other hand, there is the question of how to make social rights enforceable in law. Before that can happen they must be secured in national legislation in such a way that they are enforceable in courts. Therefore, the first step is to ask the member states to make appropriate provision in their domestic law.

[137] The CLAHR has been asked for an opinion on the Social, Health and Family Affairs Committee draft recommendation for a protocol to the European Convention on Human Rights establishing a number of social rights. See Parliamentary Assembly, Doc. 8357 (March 1999), Additional Protocol to the European Convention on Human Rights concerning fundamental social rights, Report of the Social Health and Family Affairs Committee; Parliamentary Assembly Doc. 8433 (1999), Opinion of the Committee on Legal Affairs and Human Rights on Additional protocol to the European Convention on Human Rights concerning fundamental social rights; and Parliamentary Assembly, Recommendation 1415 (1999), Additional Protocol to the European Convention on Human Rights concerning fundamental social rights.

At Council of Europe level, we must once again insist on the need to apply the Social Charter and use the new collective complaints procedure, which, as we have seen, was deemed an appropriate means of guaranteeing social rights."[138]

As we can see, the Rapporteur of the CLAHR rejected the idea of protecting economic and social rights through the existing Court.

Another reason for the Court not to enter the economic and social rights area is that there is no consensus on the acceptance of economic and social rights on the global and regional level among Member States of the CoE. For example, Bosnia and Herzegovina, Slovakia and Spain have all ratified the Optional Protocol to the ICESCR,[139] whilst none of these states have ratified the Collective Complaints Protocol. On the other side, Poland and the UK have ratified neither the Optional Protocol to the ICESCR, nor the Collective Complaints Protocol,[140] while several other CoE Member States oppose to the Optional Protocol to the ICESCR, like Norway and Sweden, although they are parties to the Collective Complaints Protocol.

Finally, as M.J. Dennis and D.P. Stewart wrote:

"The decision to put the two sets of rights in different treaties with different supervisory mechanisms was well considered, and the underlying reasons for those distinctions and decisions appear to remain valid today. Their different treatment in no way disqualified economic, social and cultural rights as rights or relegated them to a lower hierarchical rung. It did reflect an assessment of the practical difficulties that states would face in implementing generalized norms requiring substantial time and resources."[141]

Although they are referring to the UN human rights documents, this thesis contends that the same applies to the European level.[142]

Let me now briefly present the ECHR and the ESC, before turning to the main issue of this thesis, the problem of the Court entering the socio-economic sphere of human rights protection.

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138 Parliamentary Assembly Doc. 8433 (n 137), [31]-[33].
139 Bosnia and Herzegovina on 18 January 2012, Slovakia on 7 March 2012, and Spain on 23 September 2010.
140 See n 60 and n 61.
141 Michael J. Dennis and Dennis P. Stewart, 'Justiciability of economic, social and cultural rights: Should there be an international complaints mechanism to adjudicate the right to food, water, housing and health?' (2004) 98 Am. J. Int'l L. 462, 465.
142 Of course, not everyone agrees with this opinion. See Malcolm Langford, 'Closing the Gap- An Introduction to the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights' (2009) 27(1) Nordisk Tidsskrift For Menneskerettigheter 1.

CHAPTER III

EUROPEAN HUMAN RIGHTS SYSTEM

3.1 INTRODUCTION

The main focus of this thesis will be the ECHR and the work of the Court when deciding whether a violation of the ECHR occurred. More specifically, the issue will be the Court's reading in positive obligations with significant socio-economic elements into the ECHR provisions through its case-law. Therefore, before starting writing on this topic, it is important to address some of the main features of the ECHR system. Furthermore, the ESC, as the ECHR's counterpart in economic and social rights will also be presented in this chapter, before looking at its specific provisions in the following chapters. For both the ECHR and the ESC the supervising body that monitors compliance with the judgments and decisions is the CoM. For that reason, its work will be elaborated further in the thesis, and in this chapter its main responsibilities and activities will be presented.

3.2. THE EUROPEAN CONVENTION ON HUMAN RIGHTS

In Europe, the idea of a regional human rights system was born after the World War II and in 1949 the CoE was founded by 10 countries.[143] The CoE is based in Strasbourg (France) and now covers virtually the entire European continent, with its 47 member countries.[144] It seeks to develop throughout Europe common and democratic principles based on the ECHR and other reference texts on the protection of individuals.[145]

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[143] Harris, O'Boyle and Warbrick (n 25) 1. See also Leach, *Taking a case to the European Court of Human Rights* (n 24); Mowbray, *Cases and Materials on the European Convention on Human Rights* (n 23); White and Ovey (n 27); Janis, Kay and Bradley (n 26); Greer, *The European Convention on Human Rights*… (n 28); Karen Reid, *A Practitioner's Guide to the European Convention on Human Rights* (3rd ed, Thomson/Sweet & Maxwell 2008); and Peter van Dijk et al. (eds), *Theory and Practice of the European Convention on Human Rights* (4th ed, Intersentia 2006).

[144] These are Albania, Andorra, Austria, Azerbaijan, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Moldova, Monaco, Montenegro, The Netherlands, Norway, Poland, Portugal, Romania, Russian Federation, San Marino,

The ECHR was adopted in 1950 within the CoE. It entered into force in 1953 and has been ratified by all forty-seven Member States of the CoE. Today, it is an obligation of all states wishing to become a member of the CoE to ratify the ECHR. There have been numerous Protocols to the ECHR, where the substantive guarantees have been supplemented by the addition of further rights namely by the First[146], Fourth[147], Sixth[148], Seventh[149], Twelfth[150] and Thirteenth[151] Protocol that are binding on all states that have ratified them. Also, there have been Protocols that have amended the enforcement machinery of the ECHR: the Eleventh Protocol[152] and the Fourteenth Protocol[153] that replaced the Eleventh Protocol and introduced fundamental reforms to the enforcement machinery of the ECHR.

The ECHR consist of a number of fundamental rights and freedoms, all of which are civil and political in their character (the right to life, prohibition of torture, prohibition of slavery and forced labour, right to liberty and security, right to a fair trial, no punishment without law, right to respect for private and family life, freedom of thought, conscience and religion, freedom of expression, freedom of assembly and association, right to marry, right to an effective remedy, prohibition of discrimination). More rights are granted by additional protocols to the ECHR.[154] The ECHR generally represents a

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Serbia, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, the former Yugoslav Republic of Macedonia (FYRM), Turkey, Ukraine, and the United Kingdom.

145 Statute of the Council of Europe 1949, 87 UNTS 103; ETS 1.

146 213 UNTS 262; ETS 9. Adopted in 1952 and in force since 1954. All Convention State parties are parties to it except Monaco and Switzerland.

147 1469 UNTS 263; ETS 46. Adopted in 1963 and in force since 1968. All Convention State parties are parties to it except Andorra, Greece, Spain, Switzerland, Turkey and the United Kingdom.

148 ETS 114. Adopted in 1983 and in force since 1985. All Convention State parties are parties to it except Russia.

149 ETS 117. Adopted in 1984 and in force since 1988. All Convention State parties are parties to it except Belgium, Germany, Netherlands, Spain, Turkey and the United Kingdom.

150 ETS 177; 8 IHRR 884 (2002). Adopted in 2002 and in force since 2003. Seventeen State parties are parties to it: Albania, Andorra, Armenia, Bosnia and Herzegovina, Croatia, Cyprus, Finland, Georgia, Luxembourg, Montenegro, Netherlands, Romania, San Marino, Serbia, Spain, FYRM and Ukraine.

151 ETS 187; 9 IHRR 884 (2002). Adopted in 2002 and in force since 2003. All Convention State parties are parties to it except Armenia, Azerbaijan, Italy, Latvia, Poland, Russia and Spain.

152 ETS 155, 1-3 IHRR 206 (1994). Adopted in 1994 and in force since 1998. It was ratified by all State parties.

153 ETS 194; 9 IHRR 884 (2002). Adopted in 2004 and in force since 2010. It was ratified by all State parties.

154 The right to a peaceful enjoyment of possessions, the right to education and the right to free elections and a right to vote (First Protocol); Prohibition of imprisonment for debt, Freedom of movement, Prohibition of expulsion of national, Prohibition of collective expulsion of nationals (Fourth Protocol); Abolition of death penalty in time of peace and the Abolition of death penalty in all circumstances (Sixth and Thirteenth Protocol); Procedural safeguards relating to expulsion of aliens, Right of appeal in criminal matters, Compensation for wrongful conviction, Right not to be tried or punished twice and Equality between spouses (Seventh Protocol) and; General prohibition of discrimination (Twelfth Protocol).

European counterpart to the ICCPR although it does not protect certain rights protected under the ICCPR.[155]

3.3 THE EUROPEAN COURT OF HUMAN RIGHTS

The ECHR, compared to most other regional and global human rights treaties has very strong enforcement mechanisms. The European Court on Human Rights was set up in 1959. The original structure of the Court and mechanism for handling cases provided for a two-tier system of rights protection, which included the European Commission of Human Rights (EComHR, Commission) as well as the Court itself. When the caseload started to grow the idea of merging the Commission and the Court was born. On 1 November 1998, Protocol 11 came into force, eliminating the Commission and establishing a new full-time Court that replaced the former system.

The Court can receive both individual and inter-state complaints. There are today 800 million possible applicants, since all the people living under jurisdiction of State parties have direct access to the Court in order to complain violations of their fundamental rights and freedoms.

Approximately 151,600 applications were pending before a judicial formation on 1 January 2012. Barely ten years after the Protocol 11 reform of the Convention system the Court delivered its 10,000th judgment. Its output is such that more than 91% of the Court's judgments since its creation in 1959 have been delivered between 1998 and 2011. In 2011, the Court delivered 1,157 judgments concerning 1,511 applications. A total of 52,188 applications were decided in 2011.[156]

One way of dealing with the large number of applications was the introduction of the Fourteenth Protocol that made important changes to the Convention system. It took six years to come into force after its adoption because of Russia's refusal to ratify it.

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[155] Like the right to recognition as a person (Article 16 of the ICCPR) or prohibition of propaganda for war or any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence (Article 20 of the ICCPR).

[156] The European Court of Human Rights in facts and figures 2011, <http://www.echr.coe.int/NR/rdonlyres/C99DDB86-EB23-4E12-BCDA-D19B63A935AD/0/FAITS_CHIFFRES_EN_JAN2012_VERSION_WEB.pdf>, accessed 20 July 2012, 5 and 8.

The first important change brought by Protocol 14 was the introduction of a single judge.[157] The second major change introduced was the expansion of the powers of three-judge Committees.[158] These changes represent an attempt to increase the efficiency of the Court at a time when it is facing a case overload. The third major change was the most controversial one since it introduces a new admissibility criterion for individual applications.[159] Because of this provisions controversy, for the two years following the Protocol's entry into force single-judge and the three-judge Committees will be prevented from applying this criterion.[160]

Section II of the Convention governs the operation and the Procedure of the Court. The Court consists of a number of judges equal to the number of the High Contracting Parties and they must be of high moral character sitting in their own capacity.[161] They are elected by the Parliamentary Assembly by a majority of votes cast from a list of three candidates nominated by each High Contracting Party.[162] The judges of the Court's term of office is now a single period of nine years (it was a period of six years prior to Protocol 14) and they will not be eligible for re-election, as they were prior to Protocol 14.[163]

The administrative and judicial work of the Court takes place in various formations. To consider cases brought before it, the Court sits in a single-judge formation, in Committees of three judges, in Chambers of seven judges and in a Grand Chamber of seventeen judges. In accordance with the changes introduced under Protocol 14 a single judge can decide on the admissibility of the application, while the three and seven judges committees and the Grand Chamber can decide both on the admissibility and on the merits of the case.

The admissibility criteria are set out in Article 35 of the Convention. Besides the new admissibility criterion introduced under Protocol 14, the Court shall not deal with any application submitted that is anonymous or is substantially the same as a matter that has already been examined by the Court or has already been submitted to another procedure

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157 ECHR, Article 26.
158 Ibid, Article 28.
159 Ibid, Article 35 (3)(b) ("The Court shall declare inadmissible any individual application submitted under Article 34 if it considers that: b) the applicant has not suffered a significant disadvantage…").
160 This criterion has been applied by the Court for the first time already on the same day on which the Protocol 14 entered into force. See *Adrian Mihai Ioanescu v Romania* App no 36659/04 (ECtHR Decision, 1 June 2010).
161 ECHR, Articles 20 and 21.
162 Ibid, Article 22.
163 Ibid, Article 23(2).

of international investigation or settlement and contains no relevant new information.[164] Furthermore, the Court shall declare inadmissible any individual application submitted that is incompatible with the provisions of the Convention or its Protocols, manifestly ill-founded, or is an abuse of the right of individual application.[165] Any High Contracting Party may refer to the Court any alleged breach of the provisions of the Convention and its Protocols by another High Contracting Party. With the individual applications any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols may refer an alleged breach to the Court. Finally, the Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken. There are specific situations where the individual does not have to be a victim (such as where a violation of the right to life is alleged and close relatives of the dead person can submit application) or where the exhaustion of domestic remedies is inapplicable or in situations of continuing violations where a six month rule also does not apply, but they will not be discussed here.

The Court, after finding an application admissible, shall examine the case together with the representatives of the parties and, if need be, undertake an investigation, for the effective conduct of which the High Contracting Parties concerned shall furnish all necessary facilities. After looking at all the facts of the case and after holding a hearing (that shall be held in public unless there are some exceptional circumstances) the Court shall either reach a friendly settlement or deliver a judgment.

At any stage of the proceedings, the Court may place itself at the disposal of the parties concerned with a view to securing a friendly settlement. If a friendly settlement is effected, the Court shall strike the case out of its list by means of a decision.[166]

As to the judgments of the Court, its content is set out under Article 74 of the Rules of the Court. Any judgment must contain, *inter alia*, the facts of the case, a summary of the parties' submissions, the reasons on points of law and the Court's decision. Any judge who has taken part in the consideration of the case shall be entitled to annex to the

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164 Ibid, Article 35(2)(a) and (b).
165 Ibid, Article 35 (3)(a).
166 Ibid, Article 39.

judgment either a separate, concurring or dissenting opinion, or a bare statement of dissent.[167]

Within a period of three months from the date of the judgment of the Chamber, any party to the case may request that the case be referred to the Grand Chamber. A panel of five judges of the Grand Chamber shall accept the request if the case raises a serious question affecting the interpretation or application of the Convention or its Protocols, or a serious issue of general importance.[168] The case may be referred to the Grand Chamber before the judgment is made where a case pending before a Chamber raises a serious question affecting the interpretation of the Convention or its Protocols, or where the resolution of a question before the Chamber might have a result inconsistent with a judgment previously delivered by the Court. At any time before it has rendered its judgment, the Chamber may relinquish jurisdiction in favour of the Grand Chamber, unless one of the parties to the case objects.[169]

The judgment of the Grand Chamber is final. The judgment of the Chamber becomes final when the parties declare that they will not request that the case be referred to the Grand Chamber; or three months after the date of the judgment, if reference of the case to the Grand Chamber has not been requested; or when the panel of the Grand Chamber rejects the request to refer under Article 43.

Finally, the Court may, at the request of the CoM, give advisory opinions on legal questions concerning the interpretation of the Convention and its Protocols.[170] So far, it has never done so in practice.

A finding by the Court that a violation of the Convention or its Protocol has been made places an obligation on the respondent state to abide by the judgment. The final judgment of the Court shall be transmitted to the CoM, which supervises its execution. If the Court finds a violation of the Convention it does not have the authority to alter national law nor will it instruct the State on how a change in law ought to be made, since the Courts judgments are generally declaratory.[171] As to the remedies, the Court has no power to reopen domestic proceedings, annul a wrongful conviction, or ensure that the

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167 ECtHR, Rules of the Court, Registry of the Court (July 2009) Article 74.
168 ECHR, Article 43.
169 Ibid, Article 47.
170 Ibid, Articles 47-49.
171 *Marckx v Belgium* (n 81) "It is for the respondent State, and the respondent State alone, to take the measures it considers appropriate to assure that its domestic law is coherent and consistent." [20].

reforms instituted benefit the individual that brought the case in the first place.[172] If it finds it necessary, the Court shall afford just satisfaction to the injured party.[173] Generally, awards of just satisfaction can be made under three heads: pecuniary loss, non-pecuniary loss, and costs and expenses. The most frequent award of just satisfaction (beyond the declaration of finding a violation) is the award of cost and expenses.[174]

Most of the Court's judgments only declare the violations established, leaving it to states to define the required execution measures. These measures depend on the circumstances of each case. However, in a certain number of recent judgments, in particular those concerned by the pilot judgment procedure,[175] the Court has started to make recommendations with respect to execution.[176]

3.3.1 THE INTERPRETATION OF THE CONVENTION

As a human rights treaty where numerous provisions have been drafted with a lack of precision the Convention is subject to interpretation that is done by the Court.[177] The judges have to interpret and define law in concrete situations, and not just apply it.

From the perspective of public international law, since the Convention is a multilateral international treaty its interpretation should be governed by the Vienna Convention on

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172 Dinah Shelton, 'The Boundaries of Human Rights Jurisprudence in Europe' (2003) 13 Duke J. Comp. & Int'l L. 95, 147-148.
173 ECHR Article 41.
174 White and Ovey (n 27), 44.
175 The Court uses pilot judgments to identify a 'systemic or a structural' problem that affects a large number of similar applications before the Court. In pilot judgments, unlike in judgments, the Court sets out a framework for general measures in the final operative part of the judgment. These measures provide for specific instructions. Basak Cali and Nicola Bruch, *Monitoring the Implementation of Judgments of the European Court of Human Rights, A handbook for non-governmental organisations,* 2011, <http://www.londonmet.ac.uk/fms/MRSite/Research/HRSJ/EHRAC/Handbook%20for%20NGOs%20on%20monitoring%20imp%20ECHR%20judg.pdf> accessed 13 August 2012, 8.
176 *Broniowski v Poland* (2005) 40 E.H.R.R. 21 or *Gluhaković v Croatia* App No 21188/09 (ECtHR, 12 April 2011).
177 During the drafting of the Convention there were numerous suggestions for more precision in provisions, however, at the end, an approach that all the experts, members of the preparatory committee agreed upon was accepted. For example, on Article 3 there has been a long discussion on its content, where M. Cock from the UK proposed a comprehensive provision stating it "should proclaim to the world in the most absolute and direct fashion, its condemnation of the terrible wave of barbarism and bestialism which has broken over our world during the last 30 years." Library of the European Court of Human Rights, "Travaux preparatoires" of the Convention, Article 3, <http://www.echr.coe.int/library/DIGDOC/Travaux/ECHRTravaux-ART3-DH%2856%295-EN1674940.pdf> accessed 13 August 2012, 2

the Law of Treaties 1969 (VCLT),[178] as it is part of the customary international law.[179] The VCLT contains written rules of interpretation that, although were not in force at the time when the Convention was adopted, nowadays apply to international treaties.[180] The Court applies them, most of the time without referring to those rules explicitly and sometimes inconsistently.[181] Although, during the early years of its work the Court seemed willing to endorse the use of the VCLT Principles,[182] very soon it became clear that the Court will seldom invoke them. However, "though its decisions have been very much influenced by certain characteristics of the European Convention, the Court's approach to interpretation has its basis in the Vienna Convention."[183] The basic rule and the main guideline for interpretation is Article 31 of the VCLT that states that a treaty "shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose"[184]

The important feature of the Convention's rights is that most of them were drafted in a way such as to allow a wide interpretation of the guarantees it contains.[185] The indeterminacy of language itself has as a consequence lack of precise meaning or determinate range of application.[186] To date, the Court has developed numerous methods of interpretation of the Convention. The interpretative methods of the Court can be divided in two groups, related to the direction in which the judicial creativity led. The first group represents judicial self-restraint methods of interpretation where the judges used one of the four following methods: intentionalism, textualism, margin of appreciation or the doctrine of fourth instance.[187] Judicial self-restraint as an ideology

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[178] Done at Vienna on 23 May 1969 and entered into force on 27 January 1980. United Nations, Treaty Series, vol. 1155, 331 The VCLT is not strictly speaking applicable to the ECHR because it is not retrospective (see Article 4). So what is applied is custom, which the Court takes to be the same as the VCLT (see e.g., *Golder v United Kingdom* (1979-80) 1 E.H.R.R. 524, [33-34].

[179] Mowbray, 'The Creativity of the European Court of Human Rights' (n 23), 56.

[180] Karl Zemanek on Vienna Convention on the Law of Treaties, United Nations Audiovisual Library of International Law <http://untreaty.un.org/cod/avl/pdf/ha/vclt/vclt-e.pdf> accessed 13 August 2012, (when quoting the International Court of Justice in the Arbitral Award of 31 July 1989 that stated: "…(a)rticles 31 and 32 of the Vienna Convention on the Law of Treaties…may in many respects be considered as a codification of existing customary international law…" (I.C.J. Reports 1991, 69-70 [48]).

[181] VCLT (n 178), Articles 31-33.

[182] For example, see *Golder v United Kingdom* (n 178) [33] and [34].

[183] J.G. Merrills, *The Development of International Law by the European Court of Human Rights* (Manchester University Press 1993), 69.

[184] VCLT (n 178), Article 31(1).

[185] For the Convention's preparatory work see:
<http://echr.coe.int/echr/en/50/50_Preparatory_Works> accessed 13 July 2012.

[186] Mahoney, 'Judicial activism and judicial self-restraint…' (n 42), 60.

[187] Regarding the right to a fair trial the Court has often invoked the doctrine of fourth instance but it is not often used regarding other Convention provisions and is usually not mentioned as a tool of interpretation by the authors that write on the Court's interpretative methods. Dragoljub Popović wrote

takes as its premise the proposition that the judge's job is to apply the law and not to make it. The ideology of judicial activism takes an opposite position and it encourages the judges to develop the law. Law-making is a never-ending process and judges are and should be involved in the law-making process as legislators and executives are.[188] The judicial activist methods of interpretation, as used by the judges' of the Court are the living instrument doctrine or evolutive interpretation, the doctrine of effectiveness or innovative interpretation, and the doctrine of an autonomous concept.

3.3.1.1 JUDICIAL SELF-RESTRAINT METHODS OF INTERPRETATION

The first self-restraint method of interpretation that can be mentioned is intentionalism. Intentionalism places an emphasis on the parties' intentions at the time when Convention has been drafted. Although it is rarely used, to date, whenever the judges feel that it is necessary or appropriate, they look at the preparatory work, but always as a supplementary method, as Article 32 of the VCLT directs and is not an independent basis for interpretation.[189]

The interpretation in accordance with the textualist approach is looking for a meaning of the provision as it had at the time when it was drafted or enacted and the ordinary meaning of its terms. The Court itself has used an ordinary meaning of the Convention provisions by referring to the ordinary meaning of the right.[190] When invoking ordinary meaning the Court most frequently also invokes article 31(1) of the VCLT that requires the judges to interpret the provisions of an international treaty in accordance with their ordinary meaning together with the interpretation in the light of its object and purpose.

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on this doctrine, while the other authors only mentioned it in the introduction to the chapter on the right to a fair trial. See Popović, *The Emergence of the European Human Rights Law*… (n 12), 135-137; Harris, O'Boyle and Warbrick (n 25), 202; White and Ovey (n 27), 140.

[188] Popović, *The Emergence of the European Human Rights Law*… (n 12), 209; Clovis C. Morrison, *The Dynamics of Development in the European Human Rights Convention System* (Martinus Nijhoff Publishers 1981), 5. For more on judicial activism see Popović, 'Prevailing of Judicial Activism…' (n 12); Mahoney, 'Judicial activism and judicial self restraint…' (n 42); Craig Green, 'An Intellectual History of Judicial Activism' August 2008, available at <http://works.bepress.com/cgi/viewcontent.cgi?article=1000&context=roger_craig_green> (accessed 28 November 2012); Dworkin, *Law's Empire* (Harvard University Press 1986), Paul O. Carrese, *The Cloaking of Power: Montesquieu, Blackstone, and the Rise of Judicial Activism* (The University of Chicago Press 2003); and Duncan Kennedy, *A Critique of Adjudication* (Harvard University Press 1997).

[189] *James and Others v United Kingdom* (1986) 8 E.H.R.R. 123; *Nolan and K. v Russia* (2011) 53 E.H.R.R. 29.

[190] *Johnston and Others v Ireland* (1987) 9 E.H.R.R. 203.

The two interpretative methods presented above are not very often used, so they will not be given more attention in the thesis, but it would be an understatement to say that they are completely abandoned.[191] They are still used among the judges of the Court, but not as often since the interpretation needed and used in the current times is more often related to the use of the activist doctrines.

The most common restraining method of interpretation used nowadays by the Court is the doctrine of the margin of appreciation.[192] Margins of appreciation represent the "outer limits of schemes of protection, which are acceptable to the Convention."[193] This doctrine has been developed in order to allow states the space for manoeuvre that the Strasbourg organs are willing to grant national authorities, in fulfilling their obligations under the Convention.[194] The doctrine of the margin of appreciation cannot be found in the text of the Convention[195] but was developed by the Strasbourg organs themselves in order to stress the Court's subsidiary role.

The margin of appreciation doctrine has been used by the Court regarding numerous issues. It has been used in jurisprudence of Article 15,[196] of Articles 8-11,[197] and of

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[191] See Letsas, *A Theory of Interpretation*… (n 39), 68-72.

[192] Description of a margin of appreciation as a doctrine of judicial self-restraint can be seen in judgment *Cossey v United Kingdom* (1991) 13 E.H.R.R. 622 where Judge Martens, in his dissenting opinion stated that "States do not enjoy a margin of appreciation as a matter of right, but as a matter of judicial self-restraint. Saying that the Court will leave a certain margin of appreciation to the States is another way of saying that the Court - conscious that its position as an international tribunal having to develop the law in a sensitive area calls for caution - will not fully exercise its power to verify whether States have observed their engagements under the Convention, but will find a violation only if it cannot reasonably be doubted that the acts or omissions of the State in question are incompatible with those engagements." [3.6.3]. See also Paul Mahoney, 'The Doctrine of the Margin of Appreciation under the European Convention on Human Rights: Its Legitimacy in Theory and Application in Practice' (1998) (19)1 Hum.Rts.L.J. 1; Brauch (n 11); and Ronald St.J. Macdonald, 'The Margin of Appreciation' in Ronald St.J. Macdonald, Franz Matscher and Herbert Petzold (eds), *The European System for Protection of Human Rights* (Martinus Nijhoff Publishers 1994).

[193] White and Ovey (n 27) 80.

[194] Greer, *The Margin of Appreciation*… (n 28) 5.

[195] However, in the Brighton Declaration, adopted on 20 April 2012 at the High Level Conference on the Future of the European Court of Human Rights it is stated that the Conference: "a) Welcomes the development by the Court in its case law of principles such as subsidiarity and the margin of appreciation, and encourages the Court to give great prominence to and apply consistently these principles in its judgments; b) Concludes that, for reasons of transparency and accessibility, a reference to the principle of subsidiarity and the doctrine of the margin of appreciation as developed in the Court's case law should be included in the Preamble to the Convention and invites the CoM to adopt the necessary amending instrument by the end of 2013, while recalling the States Parties' commitment to give full effect to their obligation to secure the rights and freedoms defined in the Convention;" [12] (a) and (b).

[196] *Lawless v Ireland (No.3)* (1979-80) 1 E.H.R.R. 15; *Ireland v United Kingdom* (1979-80) 2 E.H.R.R. 25.

[197] *Sahin v Turkey* (2007) 44 E.H.R.R. 5; *Otto-Preminger Institut v Austria* (1995) 19 E.H.R.R. 34*; Muller v Switzerland* (1991) 13 E.H.R.R. 212*; Open Door and Dublin Well Women v Ireland* (1993) 15 E.H.R.R. 244; *Chapman v United Kingdom* (n 11); and *Christine Goodwin v United Kingdom* (n 81).

Article 2 of Protocol 1.[198] It has also been used in the jurisprudence of Article 14,[199] Article 1 of Protocol 1,[200] Article 6,[201] and Article 3 of Protocol 1.[202] The rights protected under Articles 2, 3 and 4 of the Convention have been considered as rights generating absolute obligations for the Member States and banning any incomplete application.[203]

It is commonly used by the Court as a method of judicial self-restraint, allowing states a certain amount of discretion. The width of the margin of appreciation allowed to states varies in degrees of discretion, depending on the context. However, the margin of appreciation can sometimes be narrow and then states will be granted little discretion. No strict conclusion can be drawn as to when the Court will use wide and when it will use a narrow approach. Even when it comes to the same case, it was sometimes decided differently by the Grand Chamber then it was by the Chamber.[204] Nevertheless, it can be said that more often the Court uses this doctrine to stress the Convention's subsidiary role and thereby as a self-restraint method.

The margin of appreciation doctrine has often been criticised on two different levels, either in general as a doctrine[205] or its use in certain circumstances.[206] Harris, O'Boyle and Warbrick wrote that "when it is applied widely, so as to appear to give a state a blanq cheque or to tolerate questionable practices or decisions, it may be argued that the Court has abdicated its responsibilities."[207] According to the other scholars the Court nowadays uses the margin of appreciation as a substitute for coherent legal analysis of the issues at stake, as well as to avoid very controversial judgments.[208] However, scholars

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198 *Lautsi and Others v Italy* App no 30814/06 (GC judgment, 18 March 2011) and (ECtHR, 3 November 2009); *Folgero and Others v Norway* (2008) 46 E.H.R.R. 47; *Oršuš and Others v Croatia* (2011) 52 E.H.R.R. 7; *D.H. and Others v Czech Republic* (2008) 47 E.H.R.R. 3.

199 *Belgian Linguistic case* (1979-80) 1 E.H.R.R. 252*; Abdulazis, Cabales and Balkandali v United Kingdom* (1985) 7 E.H.R.R. 471*; Frette v France* (2004) 38 E.H.R.R. 21.

200 *Sporrong and Lonnroth v Sweden* (1983) 5 E.H.R.R. 35*; James and Others v United Kingdom* (n 189).

201 *Golder v United Kingdom* (n 178); *Ruiz Torija v Spain* (1995) 19 E.H.R.R. 553.

202 *Krasnov and Skuratov v Russia* (2008) 47 E.H.R.R. 46*; Hirst v United Kingdom (No.2)* (2006) 42 E.H.R.R. 41; *Campagnano v Italy* (2009) 48 E.H.R.R. 43.

203 CoE, The Margin of Appreciation, <http://www.coe.int/t/dghl/cooperation/lisbonnetwork/themis/ECHR/Paper2_en.asp> accessed 1 June 2012.

204 See *Hatton and Others v United Kingdom* (2003) 37 E.H.R.R. 28 (GC judgment) and (2002) 34 E.H.R.R. 1; *Lautsi and Others v Italy* (n 198).

205 Brauch (n 11).

206 See Judge Loucaides (former Judge of the Court) in reflections on his experience as a judge of the Court. He particularly criticizes the jurisprudence showing certain reluctance of the Court (ERRC webpage 26 May 2010) <http://www.errc.org/cikk.php?page=8&cikk=3613> (accessed 1 June 2012); or Macdonald 'The Margin of Appreciation' (n 192), 83-124.

207 Harris, O'Boyle and Warbrick (n 25) 13.

208 Lord Lester of Herne Hill, 'Universality versus Subsidiarity: A Reply' (1998) 1 E.H.R.L.R. 1998 73, 75.

generally agree that the margin of appreciation doctrine can be justified, but that the problem lies in knowing when and how to apply it to the facts of particular case.[209]

3.3.1.2 JUDICIAL ACTIVIST METHODS OF INTERPRETATION

More important methods of interpretation in terms of this thesis are the judicial activist ones, the living instrument doctrine, the autonomous concept and the doctrine of effectiveness. The doctrine of effectiveness and the living instrument doctrine were mainly used when interpreting provisions of the Convention to introduce some socio-economic elements therein.

The autonomous concept represents a specific method of interpretation closely connected to interpreting the Convention in accordance with its object and purpose i.e. purposive interpretation, but also with all other activist interpretative methods. This concept means that on certain occasions the Court will give an autonomous meaning to a Convention term, regardless of its meaning on a national level. Its goal is to accomplish the primary goal of the Convention, which is the protection of individual rights from being violated by the Member States. P. Mahoney defined autonomous concepts as "technical terms that are employed in national legal sources and are invested with special, non-ordinary, meaning."[210] The purpose of autonomous concept is to prevent provisions of the Convention from being "subordinated to the interpretation of a term or principle in domestic law of the contracting parties."[211] The emergence of autonomous concepts began in 1971 with the *Engels v the Nerherlands*[212] judgment and it has been used widely by the Court since in order to interpret a number of concepts from the Convention.[213]

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[209] Ibid, 14. See also Paolo G. Carozza, 'Uses and Misuses of Comparative Law in International Human Rights: Some Reflections on the Jurisprudence of the European Court of Human Rights' (1998) 73 NOTRE DAME L. REV. 1217, 1220; and Harris, O'Boyle and Warbrick (n 25), 13.
[210] Letsas, *A Theory of Interpretation*… (n 39) 48.
[211] Human Rights Education for Legal Professionals, *Key concepts of the European Convention on Human Rights* (CoE September 2009), 5.
[212] *Engel and Others v Netherlands* (1979-80) 1 E.H.R.R. 647.
[213] *Paulić v Croatia* App no 3572/06 (ECtHR, 22 October 2009) (concept of home); *Konig v Germany* (1979-80) 2 E.H.R.R. 170 (civil rights and obligations); *Stec and Others v United Kingdom* (2006) 43 E.H.R.R. 47, (possessions); *Intersplav v Ukraine* (2010) 50 E.H.R.R. 4 (both for 'possessions' and 'civil rights and obligations'); *Iatridis v Greece* (2000) 30 E.H.R.R. 97 (possessions); *Siliadin v France*, (2006) 43 E.H.R.R. 16 (victim); *Pellegrin v France* (2001) 31 E.H.R.R. 26 (civil servant); *Frydlender v France* (2001) 31 E.H.R.R.

The living instrument doctrine is "one of the best known principles of Strasbourg case-law. It expresses the principle that the Convention is interpreted "in the light of present day conditions", that it evolves through the interpretation of the Court."[214] The first time the Court used the wording living instrument was already in 1978 in the *Tyrer* judgment. Here, the question was whether the corporal punishment of a juvenile on the Isle of Man amounted to a degrading treatment under Article 3. In deciding this question the Court stated that it "…(m)ust also recall that the Convention is a living instrument which, as the Commission rightly stressed, must be interpreted in the light of present-day conditions. In the case now before it the Court cannot but be influenced by the developments and commonly accepted standards in the penal policy of the Member States of the Council of Europe in this field."[215]

A. Mowbray stressed that critics of judicial activism might contend that the Court in *Tyrer* provided little justification for or elaboration of the living instrument[216] and this is true. There was no reference to Member States' criminal law, no comparative study on corporal punishment and no attempt to establish common standards of Member States in abolishing corporal punishment.[217] Nowhere in the judgment can one see why the Court started using the living instrument doctrine and what is the Court justification doing so. Maybe, if the Court at the beginning of its use of this doctrine explained when and how it will be used i.e. theoretically justified it, nowadays we wouldn't be faced with discrepancies which will be seen later in the thesis. However, despite not providing reasons or justification for adopting this doctrine, the Court started regularly using it when interpreting certain Convention right. The living instrument doctrine is now widely used and accepted,[218] not only by the Court but in interpretation of various provisions in international human rights law, and as will be seen, the ECSR is using it.[219]

52; *Eriksen v Norway* (2000) 29 E.H.R.R. 328 (lawful detention); *Chassagnou and others v France* (2000) 29 E.H.R.R. 615 (association).

[214] Luzius Wildhaber, 'The European Court of Human Rights in Action' (2004) 21 Ritsumeikan Law Review 83, 84.

[215] *Tyrer v United Kingdom* (1979-80) 2 E.H.R.R. 1 [31].

[216] Mowbray, 'The Creativity of the European Court of Human Rights' (n 23), 61.

[217] Letsas, *A Theory of Interpretation*… (n 39), 76.

[218] *Selmouni v France* (n 10) [102]; *Hatton and Others v United Kingdom* (GC judgment) (n 204), Joined dissenting opinion of Judges Costa, Ress, Turmen, Zupančič and Steiner [2]; *Soering v United Kingdom* (1989) 11 E.H.R.R. 439 [102]; *Henaf v France* (2005) 40 E.H.R.R. 44 [55]; *Sandra Janković v Croatia* App no 38478/05 (ECtHR, 14 September 2009) [47]; *Beganović v Croatia* App no 46423/06 (ECtHR, 25 September 2009) [66].

[219] It has been used in *Marangopoulos Foundation for Human Rights (MFHR) v Greece* (n 103) [194] that will be discussed in detail in chapter V, but also, for example, in *International Federation of Human Rights League (FIDH) v France* (14/2003), decision on the merits of 3 November 2004 [26]-[29] and numerous others.

In the context of this thesis, the use of the living instrument doctrine is mostly visible in the interpretation of Article 3 as to guarantee the right to have satisfactory detention conditions and healthcare of certain standard in prisons. The Court has from 2001 started imposing those obligations on states under Article 3. In *Dougoz v Greece*,[220] the first judgment where the Court found a violation of Article 3 based on poor detention conditions,[221] it did not directly refer to the living instrument doctrine. However, it can be concluded that the Court did find a violation of Article 3 by using the living instrument doctrine, without referring to it explicitly and without providing justification for such reasoning. If we bear in mind that the Court was reluctant in finding a violation of Article 3 based on poor detention conditions and unsatisfactory healthcare in prisons prior to 2001, we can conclude that it was the use of living instrument doctrine that led to these developments, so that detention conditions that did not satisfy the minimum level of severity as to represent a violation of Article 3 in the past, nowadays will. Whether or not the Court explicitly invoked it, it is clear that it was the use of this doctrine that allowed the Court to extend the scope of Article 3's protections.

When it comes to other issues relevant for this thesis, the living instrument doctrine has also been invoked by the Court in the *Hatton* case regarding the right to a healthy environment, both in the Chamber judgment and in the Grand Chamber judgment.[222]

The doctrine of effectiveness, together with the living instrument doctrine, is the most important doctrine for this thesis, since it is the use of these interpretative methods that enabled the Court to deliver judgments with significant socio-economic elements. By introducing and using the doctrine of effectiveness, the Court is giving provisions of the Convention the "fullest weight and effect consistent with the language used and with the rest of the text and in such a way that every part of it can be given meaning."[223] The essence of this approach is that states cannot be in compliance with the Convention simply by prohibiting conduct that contravenes the Convention, but they might have to take positive action to protect its rights.[224] Therefore, the general idea under this

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[220] *Dougoz v Greece* (n 81).
[221] Besides the *Greek case* (1969) 12 YB 170 EComHR.
[222] *Hatton and Others v United Kingdom* (n 204) Partly dissenting opinion of Judge Greve and *Hatton and Others v United Kingdom* (GC judgment) (n 204) Joint dissenting opinion of Judges Costa, Ress, Turmen, Zupančič and Steiner.
[223] Merrills (n 183), 89.
[224] Donald McRae, 'Approaches to the Interpretation of Treaties: The European Court of Human Rights and the WTO Appellate Body' in Stephan Breintenmoser, Bernhard Ehrenzeller et al (eds), *Human Rights,*

approach is to impose positive obligations on the Contracting states. The principle of effectiveness is used by the Court either when it decides whether a provision is applicable or whether a clearly applicable provision has been violated.

The first judgment where the doctrine of effectiveness was used is *Golder*[225] and already here the use of this doctrine was controversial, since in a way, the Court introduced a new right under the Convention. The question was whether the right of access to a court is guaranteed under Article 6 since the text of Article 6 provides only rights to individuals who are already before the Court. The Court decided to ignore the intention of the drafters and said:

"Taking all the preceding considerations together, it follows that the right of access constitutes an element which is inherent in the right stated by Article 6 para. 1. This is not an extensive interpretation forcing new obligations on the Contracting States: it is based on the very terms of the first sentence of Article 6 para. 1 read in its context and having regard to the object and purpose of the Convention, a lawmaking treaty (see the Wemhoff judgment of 27 June 1968, Series A no. 7, p. 23, para. 8), and to general principles of law."[226]

The issue of effective access to a court has been invoked before the Court on numerous other occasions, for example in *Airey v Ireland,*[227] *P, C and S v United Kingdom*[228] and *Artico v Italy.*[229]

Just like any other method of interpretation, the method of effectiveness is not limitless. The Convention is not intended for the protection of all human rights and the Court cannot extend its scope without limits. The problem is that, in order to protect rights of individuals, even the ones not implicitly or explicitly guaranteed under the Convention, the Court can almost always extend the scope of the right by using the doctrine of effectiveness.

Regarding the case-law that will be discussed in the thesis, it was the doctrine of effectiveness that enabled such broad interpretation of the Convention's provisions as

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Democracy and the Rule of Law: Liber amicorum Luzius Wildhaber (Nomos Verlagsgesellschaft 2007), 1411-1412.

[225] *Golder v United Kingdom* (n 178).

[226] Ibid [36].

[227] *Airey v Ireland* (n 3).

[228] *P, C and S v United Kingdom* (2002) 35 E.H.R.R. 31.

[229] *Artico v Italy* (1981) 3 E.H.R.R. 1.

to introduce the right to a healthy environment,[230] the right to healthcare,[231] and the right to adequate housing.[232] Although the Court very rarely explicitly invoked the doctrine of effectiveness, just like with the living instrument doctrine, it did so implicitly. By requiring states to take positive and effective measures to secure the Convention rights, even the ones not included in the Convention, the Court used the doctrine of effectiveness.

What interpretative method will prevail to a large degree depends on the composition of the judges sitting in the Chamber that adopts a judgment (or in some cases the Grand Chamber). It cannot be said that some judges always take an activist approach or that some always take a self-restraint approach. In the 1970's the distinction was much clearer. For example, Judge Fitzmaurice was the strongest supporter of the self-restraint approach, which is visible from his dissenting opinions elaborated in his judgments.[233] However, as Judge Wildhaber, a former president of the Court stated:

"One of the judges may move ahead and when the composition of the Chamber is favourable, the majority may do something very activist. If you then follow precedent, you are bound to follow the outcome of judicial activism. As a result, you can be on the side of judicial self-restraint and at the same time you want to change precedent. Because of the complexities of our Court it is not a simple continuum. Are you to the same extent a judicial activist when it concerns your own country? You know your own system, you know it works and you think it hasn't led to many abuses. Even as a very objective observer you may be more lenient towards your own country."[234]

As will be seen in chapter VIII when discussing the Court's inconsistency, today it is not clear when and why the Court resorts to certain interpretative methods. Although on most occasions the Court points out the need for effective and practical protection of rights in accordance with the current day conditions, thereby using the living instrument and the doctrine of effectiveness, it occasionally returns to the judicial self-restraint methods of interpretation.

Now, the CoM as the body charged with the task of supervising the execution of the Court's judgments will be briefly discussed.

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230 *Moreno Gomez v Spain* (2005) 41 E.H.R.R. 40 [53]-[56]; *Leon and Agnieszak Kania v Poland* App no 12605/03 (ECtHR, 21 July 2009) [99].
231 *Georgel and Georgeta Stoicescu v Romania* App no 9718/03 (ECtHR, 26 July 2011) [59].
232 *Yordanova and Others v Bulgaria* App no 25446/06 (ECtHR, 24 April 2012) [129].
233 For example see Judge Fitzmaurice dissenting opinions in the cases: *Golder v United Kingdom* (n 178); *Guzzardi v Italy* (1981) 3 E.H.R.R. 333; and *Tyrer v United Kingdom* (n 215).
234 Robin C.A. White and Iris Boussiakou, 'Separate Opinions in the European Court of Human Rights' (2009) 9 Hum. Rts. L. Rev. 37, 45.

3.4. THE COMMITTEE OF MINISTERS

The CoM is the CoE's decision-making body. It comprises the Foreign Affairs Ministers of all the Member States, or their permanent diplomatic representatives in Strasbourg.[235] Under Article 14 of the Statute of the Council of Europe each Member State shall be entitled to one representative on the CoM, and each representative shall be entitled to one vote. The work and activities of the CoM include political dialogue, interacting with the Parliamentary Assembly, interacting with the Congress of Local and Regional Authorities of the CoE, admitting new Member States, monitoring respect of commitments by Member States, concluding Conventions and agreements, adopting recommendations to Member States, adopting the budget, adopting and monitoring the Programme of Activities, implementing cooperation and assistance programmes and supervising the execution of judgments of the Court.[236] Here, I will not look at all the activities of the CoM, but only the ones relevant for the thesis.

Currently the main tasks of the CoM relating to the Court are the supervision of the execution of judgements of the Court, receiving and forwarding the lists of candidates for the election of judges to the Parliamentary Assembly, requesting advisory opinions of the Court and setting the Court's annual budget. The CoM, when supervising the execution of judgments, operates under Rules of Procedure adopted in May 2006.[237]The CoM meets in four three-day sessions each year. Because of the increasing number of judgements delivered by the Court the CoM has adopted a series of guidelines (at a meeting in April 2004), as to when the case will be proposed for debate. A case will be proposed for debate if: the applicant's situation warrants special supervision because of the violation; it marks a new departure in case-law by the Court; it discloses a potential systemic problem which could give rise to similar cases in future; there is a difference of appreciation between the Secretariat and the respondent state concerning the measures

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[235] Statute of the Council of Europe (n 145).
[236] Committee of Ministers, About the Committee of Ministers,
<http://www.coe.int/t/cm/aboutCM_en.asp> accessed 1 July 2012.
[237] Rules of the CoM for the supervision of the execution of judgments and the terms of friendly settlement, adopted by the Committee of Ministers on 10 May 2006 at the 964th meeting of the Ministers' Deputies.

to be taken; there is a delay in execution with reference to the timetable; or a Government delegation or the Secretariat requests it.[238]

When the Court has decided that there has been a violation of the Convention (or its Protocols) and has awarded just satisfaction to the injured party, the CoM shall invite the High Contracting Party concerned to inform it of the measures which it has taken or intends to take in consequence of the judgment, having regard to its obligation to abide by it.[239]

Furthermore,

> "When supervising the execution of a judgment by the High Contracting Party concerned, pursuant to Article 46, paragraph 2, of the Convention, the Committee of Ministers shall examine:
> *a.* whether any just satisfaction awarded by the Court has been paid, including as the case may be, default interest; and
> *b.* if required, and taking into account the discretion of the High Contracting Party concerned to choose the means necessary to comply with the judgment, whether:
>
> i. individual measures have been taken to ensure that the violation has ceased and that the injured party is put, as far as possible, in the same situation as that party enjoyed prior to the violation of the Convention;
>
> ii. general measures have been adopted, preventing new violations similar to that or those found or putting an end to continuing violations."[240]

Therefore, the obligation to abide by the judgments encompasses three main elements.

As to the just satisfaction, the CoM only has the task of examining whether just satisfaction awarded has been paid.

As far as the applicant's individual situation is concerned, the main obligation is to ensure that individual measures are taken. This obligation is, as in international law in general, to achieve, as far as possible, *restitutio in integrum* for the applicant, as the provision itself states. The most commonly used individual measure required for *restitutio in integrum* is the reopening of domestic legal procedures, mainly in criminal matters and the erasure of a conviction from the criminal records. It is only where *restitutio in integrum*

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[238] See more in *Human rights working methods—Improved effectiveness of the Committee of Ministers' supervision of execution of judgments,* CM/Inf(2004)8 Final, April 7, 2004, Appendix 1.
[239] Rules of the Committee of Ministers (n 237) Rule 6(1).
[240] Ibid, Rule 6(2).

proves to be legally or physically impossible that it will be replaced by compensation, which, moreover, the victim often prefers. [241]

On a more general level, the obligation also includes the prevention of violations similar to those found by the Court and that is the primary aim of the general measures. General measures which may be necessary include constitutional changes or legislative amendments, changes in the case-law of the national courts, as well as practical measures, such as improving prison conditions. The efficiency of domestic remedies is an important element of general measures and these are recommended by the CoM to review, following the Court's judgments which point to structural or general deficiencies in national law or practice, the effectiveness of the existing remedies and, where necessary, set up effective ones, in order to avoid repetitive cases being brought before the Court. [242]

Where the CoM considers that all execution measures required have been adopted, it closes its examination of the case by adopting a final resolution (pending the adoption of such a resolution, cases are listed under a special appendix to the agenda).

Although according to the Convention the supervision of the execution of the judgments is a matter for the CoM alone, in reality the Court and the Parliamentary Assembly have come to play a greater role in the process of the execution of judgments. As already mentioned, through the 'pilot case' procedures, the Court often specifies the general measures to be adopted. Also, in some newer cases the Court has started indicating, or even ordering, states which individual or general measures they should take.[243]

The role of the Parliamentary Assembly in the supervision of the execution of judgments is that it is now included on the agenda of one of the CoM four meetings each year.[244] Also, its members can ask questions in writing to members of the CoM to

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241 See Execution of judgments of the European Court of Human Rights, <http://www.coe.int/t/dghl/monitoring/execution/Presentation/About_en.asp> accessed 1 July 2012; and Elizabeth Lambert-Abdelgawad, *The Execution of Judgments of the European Court of Human Rights* (Human rights files No. 19, 2nd ed, CoE Publishing 2008).

242 CoE, Committee of Ministers, About the Committee of Ministers, <http://www.coe.int/t/cm/aboutCM_en.asp> accessed 1 July 2012.

243 See *L. v Lithuania* (2008) 46 E.H.R.R. 22; *Zengin v Turkey* (2008) 46 E.H.R.R. 44; *Sejdovic v Italy* App no 56581/00 (GC judgment) (ECtHR, 1 March 2006); *Ocalan v Turkey* (2005) 41 E.H.R.R. 45; *Yakovenko and Others v Ukraine* (n 123).

244 White and Ovey (n 27), 60.

obtain explanations concerning the failure to execute certain judgment. The Parliamentary Assembly also envisages asking the Minister of Justice of the state concerned to give an explanation in person to its members. Finally, the Parliamentary Assembly has secured a promise from the CoM that there will be formal consultations between their committees.[245] Although the role of the Parliamentary Assembly is purely consultative, its importance lies in the public nature of its questions and criticisms.

It is important to mention the sanctions available in order to force states to comply with their legal obligations as set out under the Court's judgments. The CoM has several ways of pressuring states to comply with the judgment. The least invasive one is to pressure the government representative at the CoM's meeting or more formally, for the Chairman of the CoM to send bilateral letters to notify the government concerned of the CoM's views on any particular matter.[246] Furthermore, the CoM can issue an interim resolution directly calling upon the competent state authority to resolve the problems it is encountering in enforcing of judgments.[247] Interim resolutions can take various forms. The first type consists of taking note that no measures have been adopted and in inviting states to comply with the judgment. The second type provides the CoM with the opportunity to note certain progress and to encourage states to adopt measures in the future. This is the most common type of resolution. Finally, a third type of interim resolution, which is used only exceptionally, is designed to threaten the state with more serious measures.[248] Interim resolutions are set out in Rule 16 of the CoM Rules stating that in the course of its supervision of the execution of a judgment or of the terms of a friendly settlement, the CoM may adopt interim resolutions, notably in order to provide information on the state of progress of the execution or, where appropriate, to express concern and/or to make suggestions with respect to the execution.

Finally, according to Article 3 of the Statute of the CoE: "Every member of the Council of Europe must accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms, and collaborate sincerely and effectively in the realisation of the aim of the Council as

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[245] Elizabeth Lambert-Abdelgawad 'The Execution of the Judgments of the European Court of Human Rights: Towards a Non-coercive and Participatory Model of Accountability' (2009) 69 ZaöRV 471, 484.
[246] White and Ovey (n 27), 62.
[247] Ibid.
[248] For more on interim resolutions, see Lambert-Abdelgawad, *The Execution of Judgments of the European Court of Human Rights* (n 241) 36-37.

specified in chapter I"[249] and Article 8 goes on by saying "Any member of the Council of Europe which has seriously violated Article 3 may be suspended from its rights of representation and requested by the CoM to withdraw under Article 7. If such member does not comply with this request, the Committee may decide that it has ceased to be a member of the Council as from such date as the Committee may determine."[250] The CoM is very reluctant when it comes to suspending a country from its rights of representation. For example, Russia escaped suspension in 2000 when the Parliamentary Assembly called upon the CoM to suspend Russia unless it immediately halted human rights abuses in Chechnya. Even then, after a meeting in Strasbourg, the CoM welcomed Russia's efforts to respond to Western criticism of its conduct and made no mention of any possible sanctions.

Protocol 14 also seeks to improve the effectiveness of the execution of the Court's judgments and to that end added three more paragraphs to Article 46 of the Convention. The new Article 46(3) empowers the CoM to request an interpretation from the Court of a final judgment, for the purpose of facilitating the supervision of its execution. Secondly, new paragraph 46(4) allows the CoM to refer to the Court the question of whether the Member State had failed to fulfil its obligation under paragraph 1 to abide by the judgment. This can be done only after it has served a formal notice on that State party and adopted a decision by a majority vote of two-thirds representatives of the CoM. If the Court finds a violation of Article 46(1), it refers the case back to the CoM for consideration of the measures to be taken, pursuant to Article 46(5). In case the Court does not find a violation, it will also refer the case to the CoM which shall close its examination of the case.[251] However, no express sanction (apart from those already mentioned above) will be available if the Court finds that a state has indeed failed to fulfil its obligations under Article 46(1).

Although these improved working methods of the CoM in supervising the execution of judgements are to be welcomed, they have received numerous criticisms regarding their actual effectiveness. First of all, the CoM Rules are not prescriptive of states. If the Court finds a violation of the Convention, the respondent state is invited to inform the CoM "of the measures which the High Contracting Party has taken or intends to take in

[249] Statute of the Council of Europe (n 145) Article 3.
[250] Ibid, Article 8.
[251] Protocol No. 14 (n 153) Article 46(5).

consequence of the judgment".[252] The CoM is only obliged to consider individual or general measures if required, and also taking into account the discretion of the High Contracting Party concerned to choose the means necessary to comply with the judgment. The Rules make no reference to the timing of the state's response. The supervision process can also be criticised for its inaccessibility. The CoM Rules require a certain level of public access. The agenda of human rights meetings must be made public and the practice is for the CoM to publish general information about the progress of the execution of judgments after each human rights meeting. Furthermore, information provided by states (and indeed by the injured party and civil society organisations) should also be accessible to the public. However, it is the practical inaccessibility of information which remains a serious problem since little information is actually available to the public while most of the information remains unavailable.

One of the biggest criticisms is whether CoM exerts enough pressure on the state in order for it to execute the judgements. As the Venice Commission has recalled, the supervisory function of the CoM is a "collective responsibility". As a result, "the execution of a particular judgment is not only the legal obligation of the State concerned, but a common concern."[253] Criticism was made of the rigour of the process in terms of its success in preventing further similar Convention breaches. There is an overwhelming case for making the implementation process in respect of systemic violation cases more frequent and more rigorous.[254] An amendment to the CoM Rules made in May 2006 acknowledged this argument by introducing an obligation on the CoM to give priority to systemic cases while the Venice Commission also pointed to insufficient and unsatisfactory co-operation from the states. Finally, in his paper 'Protocol 14 and the Future of the European Court of Human Rights' S. Greer has pointed out that the implementation of the judgements is the "Achilles heel of the entire Convention system," because of the Council of Europe's powerlessness to deal with persistently non-compliant states."[255]

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[252] Rules of the Committee of Ministers (n 237) 6(1) and 7.
[253] *Opinion on the Implementation of the Judgments of the European Court of Human Rights*, European Commission for Democracy Through Law (Venice Commission) (Jan Helgesen, Giorgio Malinverni, Franz Matscher and Pieter van Dijk), Opinion No.209/2002, CDL-AD (2002) 34, 18 December 2002 [41].
[254] Philip Leach, 'The effectiveness of the Committee of Ministers in supervising the enforcement of judgements of the European Court of Human Rights' [2006] P.L, Aut 433, 455.
[255] Steven Greer, 'Protocol 14 and the Future of the European Court of Human Rights' [2005] P.L. Spr 83, 92.

Up to today, states have on most occasions abided by the final judgments, either in their entirety or at least, in part.[256] It seems as if it is not only the possibility of sanctions that urge the states to comply with the judgments but their political interests and their belief in the legitimacy of the Court. However, recently delays in executing the Court's judgments are noticeable. Besides the greater number of applications and thereby of judgments, other reasons include the fact that the Court is reading more rights into the Convention and the imposition of judgments that contain obligations with significant socio-economic elements. Those are exactly the problems that will be discussed further in the thesis together with possible solutions for those problems.

Before that, the role of the CoM under the ESC system will be presented, within the following section on the ESC.

3.5 THE EUROPEAN SOCIAL CHARTER

As pointed out in the previous chapter, within the CoE a deliberate decision was made to have two different human rights instruments, one on civil and political rights and the other one on economic and social rights. The ECHR came into force in 1953 and eight years later, the ESC was adopted.

The ESC sets out economic and social rights and freedoms and establishes a supervisory mechanism guaranteeing their respect by the States parties. Following its revision, the 1996 Revised ESC, which came into force in 1999, is gradually replacing the initial 1961 treaty. By September 2012, all the CoE states had signed either the Revised ESC or the 1961 ESC, while 43 states had ratified one or both versions of the ESC.[257]

The ESC makes a distinction between 'core' and 'non-core' rights. In the original ESC there are seven 'core' rights[258] while the Revised ESC adds two further core rights- the

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[256] Systematic refusal by a state to execute a judgment is uncommon and more than cases of non-compliance, it is cases of late execution that seem to raise difficulties. See Lambert-Abdelgawad 'The Execution of the Judgments of the European Court of Human Rights…' (n 245) 409-501.

[257] Out of 43 states that have ratified the ESC, 11 have ratified only the Original ESC while 32 have ratified the Revised ESC. European Social Charter, <http://www.coe.int/t/dghl/monitoring/socialcharter/Presentation/Overview_en.asp> accessed 4 July 2012.

[258] The rights to work; to form trade unions and employers' associations; to bargain collectively; to social security; to social and medical assistance; to social, legal and economic protection for the family; and to protection for migrant workers.

right of children to protection and the right to equal opportunities and treatment in employment. The second category of rights comprises 'non-core' rights.[259] The ESC is unique among human rights treaties since it permits its parties not to accept all the rights it contains.[260] The probable reason for that are the considerable differences in the level of economic and social progress among members of the CoE.[261] The consequence is that it is unlikely that many members to the CoE are subject to the same set of obligations under the ESC.[262] Although allowing states not to accept all the ESC provision can be justified by economic and social differences among Member States of the CoE, this fact by itself shows that the CoE is not ready to equalise the protection of economic and social rights with the protection of civil and political rights.

As to the compliance mechanism under the ESC, there are two forms of machinery seeking to ensure that parties comply with obligations under the ESC.[263] The first is the system of Reporting which has been in existence since 1961 and is obligatory for all the State parties to the ESC. As to the second mechanism, the system of Collective Complaints, it was introduced in 1995 and has been in force since 1998. So far only 15 Member States have ratified it.[264]

The ESCR ascertains whether states have honoured the undertakings set out in the ESC. The CoM elects fifteen independent, impartial members for a period of six years,

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[259] In the Original ESC these rights are: the rights to just conditions of work; safe and healthy working conditions; fair remuneration; vocational guidance and training; special protection for children, women, the handicapped and migrants; health; social welfare services; and special protection for mothers and children, families, the handicapped and the elderly, while the Additional Protocol to the ESC from 1998 adds four more rights and the Revised ESC adds eight more non-core rights. See more in Khaliq and Churchill, 'The European Committee of Social Rights: putting flesh…' (n 29) 429; de Burca and Witte (n 33); Stein Evju 'The European Social Charter' in Roger Blanplain (ed) *The Council of Europe and the Social Challenges of the XXIst Century* (Kluwer 2001); and Harris and Darcy (n 32).

[260] Each of the Parties undertake: a. to consider Part I of this Charter as a declaration of the aims which it will pursue by all appropriate means, as stated in the introductory paragraph of that part; b. to consider itself bound by at least six of the following nine articles of Part II of this Charter: Articles 1, 5, 6, 7, 12, 13, 16, 19 and 20; c. to consider itself bound by an additional number of articles or paragraphs of Part II of the Charter which it may select, provided that the total number of articles or numbered paragraphs by which it is bound is not less than sixteen articles or sixty-three numbered paragraphs. Part III, Article A (1) of the Revised ESC.

[261] Donna Gomien, David John Harris and Leo Zwaak, *Law and Practice of the European Convention on Human Rights and the European Social Charter* (CoE 1996), 379.

[262] European Social Charter, Table of Accepted Provisions (situation at July 2012) <http://www.coe.int/t/dghl/monitoring/socialcharter/Presentation/ProvisionTableRevJuly2012_en.pdf > accessed 14 December 2012

[263] For more on the ESC supervisory system see Phlip Alston, 'Assessing the Strength and Weaknesses of the European Social Charter's Supervisory System' in Grainne de Burca and Bruno de Witte (n 33); Khaliq and Churchill, 'The European Committee of Social Rights: putting flesh…' (n 29); Churchill and Khaliq, 'Violations of Economic, Social, and Cultural Rights…' (n 29); Harris and Darcy (n 32); Churchill and Khaliq, 'The Collective Complaints System…' (n 29).

[264] European Social Charter website (n 257).

renewable once. The ECSR determines whether or not national law and practice in states parties are in conformity with the ESC.[265]

When it comes to the Reporting procedure, every year State parties submit a report indicating how they implement the ESC in law and in practice. Each report concerns some of the accepted provisions of the ESC. The provisions are divided into four thematic groups and each provision of the ESC will be reported on once every four years. The ECSR examines the reports and decides whether or not the situations in the countries concerned are in conformity with the ESC. Its decisions, known as 'conclusions', are published every year.

The CoM intervenes in the last stage of the supervisory process in the procedure based on national reports. The CoM's work is prepared by a Governmental Committee comprising representatives of the governments of the State parties to the ESC, assisted by observers representing European employers' organisations and trade unions.[266] After receiving the report the CoM adopts a resolution closing each supervision cycle and addresses individual recommendations to Contracting Parties where necessary.[267] However, the CoM rarely issues recommendations; so far it has only issued thirty-seven of them.[268] It also needs to be mentioned that the CoM recommendations regarding national reports are usually not detailed nor do they give clear guidance to the state on the measures it needs to take.[269]

3.6 THE COLLECTIVE COMPLAINTS SYSTEM

According to the preamble to the 1995 Protocol providing for a system of Collective Complaints, the Member States have "Resolved to take new measures to improve the effective enforcement of the social rights guaranteed by the Charter; Considering that this aim could be achieved in particular by the establishment of a Collective Complaints

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265 Ibid.
266 Ibid.
267 European Social Charter: Short Guide (CoE Publishing 2000), 47.
268 For a list of CoM Recommendations on the European Social Charter see Committee of Ministers, Recommendations- European Social Charter
<http://www.coe.int/t/cm/adoptedTexts_en.asp> accessed 13 July 2012.
269 See for example CoM Recommendation no. R ChS (95) 47, 22 June 1995 on the application of the European Social Charter by Greece during the period 1990-1991 (13th supervision cycle - part I); Recommendation no. R ChS (98) 4/ 4 February 1998 on the application of the European Social Charter by Turkey during the period 1993-1994 (13th supervision cycle, part IV).

procedure, which, *inter alia*, would strengthen the participation of management and labour and of non-governmental organisations."[270] Under this Protocol, which came into force in 1998, complaints of violations of the ESC may be lodged with the ECSR.[271] Complaints of non-compliance may be made by four types of organisations, never by an individual applicant. Those organisations are: - the European Trade Union Confederation, BUSINESSEUROPE and International Organisation of Employers; - Non-governmental organisations (NGOs) with participative status to the Council of Europe which are on a list drawn up for this purpose by the Governmental Committee; -Employers' organisations and trade unions in the country concerned and – National NGOs (in the case of states which have agreed to this).[272]

The ECSR examines the complaint and, if the formal requirements have been met, declares it admissible. Unlike the Convention, the Collective Complaints system does not have a victim requirement, or a requirement to exhaust domestic remedies, nor is there a time limit to bring a complaint. Once the complaint has been declared admissible, a written procedure is set in motion, with an exchange of memorials between the parties. The ECSR then takes a decision on the merits of the case, by drawing up a report with its conclusions. The ECSR forwards its decision to the parties concerned and the CoM in a report, which is made public within four months of its being forwarded. As w can see, unlike in the Reporting procedure, under the Collective Complaints procedure the ECSR sends its decition directly to the CoM without going through the Governmental Committee. If the ECSR finds that the ESC has been complied with, the CoM is to adopt a resolution to this effect by a simple majority. However, if it concludes that the ESC has not been complied with, the CoM shall adopt by a two-thirds majority a recommendation addressed to the defendant state. Unfortunately, despite the fact that most of the complaints have led to at least some findings of non-compliance, the CoM has only made a recommendation to the state once.[273]

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[270] Additional Protocol to the European Social Charter Providing for a System of Collective Complaints, Strasbourg, 9 XI 1995, ETS No. 158.

[271] See Churchill and Khaliq, 'Violations of Economic, Social and Cultural Rights…' (n 29).

[272] So far only Finland has recognised a right of national NGOs to lodge complaint against it.

[273] Recommendation no. R ChS (2001) 1 on Collective Complaint No. 6/1999, *Syndicat national des Professions du tourisme against France* (Adopted by the Committee of Ministers on 31 January 2001 at the 738th meeting of the Ministers Deputies).

There have been several criticisms to the Collective Complaints system, particularly its procedural aspects, the lack of remedial powers and the significant role played by the CoM.[274] The ECSR has no power to order remedies; it can only deliver declaratory decisions. Despite the criticism that can all be considered valid, it still might be said that the Collective Complaints system can be regarded as a quasi-judicial process specifically for economic and social rights because of the jurisprudence developed by the ECSR. Since 1998, 82 complaints have been registered.[275]

As to the second criticism, regarding the significant role of the CoM (which is a political body), the ECSR itself made a strong assertion of its authority in *Confederation française de l'Encaderment (CFE-CGC) v France:*

"The Committee cannot subscribe to the Government's view that when they considered Complaint No. 9/2000 CFE-CGC v. France, the Ministers' Deputies found that there had been no violation of the Revised Charter. It is clear from the wording of the Protocol providing for a system of collective complaints that only the European Committee of Social Rights can determine whether or not a situation is in conformity with the Charter. This applies to any treaty establishing a judicial or quasi-judicial body to assess contracting parties' compliance with that treaty. The explanatory report to the Protocol explicitly states that the Committee of Ministers cannot reverse the legal assessment made by the Committee of independent experts, but may only decide whether or not to additionally make a recommendation to the state concerned. Admittedly the Committee of Ministers, when it decides to use this power may take account of any social and economic policy considerations in its reasoning, but it may not question the legal assessment."[276]

This statement was made by the ECSR to emphasize its exclusive competence in making determinations about compliance with the obligations under the ESC and the lack of CoM's power to reverse ECSR decisions. The Collective Complaints system has enabled the ECSR to make new interpretations of the ESC rights, even on the issues that have never been addressed through states reports.[277]

However, the fact is that the CoM reacts quite mildly after the ECSR finds a violation of the ESC. Maybe the best examples are the two collective complaints concerning Italy where the ECSR found violations of the ESC based on the same facts of the case,

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[274] Holly Cullen 'The collective complaints system of the European Social Charter: interpretative methods of the European Committee of Social Rights' (2009) 9(1) H.R.L. Rev. 61, 61.
[275] See European Social Charter, Collective Complaints list and state of procedure, <http://www.coe.int/t/dghl/monitoring/socialcharter/Complaints/Complaints_en.asp>, accessed 15 May 2012.
[276] *Confédération Française de l'Encadrement (CFE CGC) v France* (16/2003), (2005) 41 E.H.R.R. SE17 [20-21].
[277] Cullen (n 273) 65.

meaning that the CoM did not manage to urge Italy into remedying the situation.[278] These complaints will be presented in detail in chapter VII but it is relevant to mention here that following the decision of the ECSR in Complaint No. 27/2004 the CoM delivered a Resolution in 2006 where it had a rather mild reaction to violations of the Charter's Articles 31(1), 31(2) and E found by the ECSR.[279]

The CoM was equally weak in its resolution on Complaint 58/2009,[280] especially as in its decision on the merits of this complaint the ECSR had said that Italy had failed to comply with the ECSR's findings in Complaint 27/2004 and that that amounted to an aggravated violation of the ESC.[281] The other problematic issues under both the Reporting and the Collective Complaints system will be discussed further in the following chapters when discussing the ESC substantive provisions.

3.7 INTERPRETATIVE METHODS OF THE EUROPEAN COMMITTTEE ON SOCIAL RIGHTS

Just like the ECHR, the ESC has numerous provisions that are quite general and abstract in terms, and thereby in need of interpretation. The ECSR started interpreting the ESC already through the Reporting procedure, but the main interpretative methods were articulated through the Collective Complaints system. For that reason, the ECSR interpretative methods as used while deciding on the collective complaints will be presented.

The general approach of the ESCR has been most clearly and fully spelt out in the *International Federation of Human Rights League (FIDH) v France*.[282] In this decision, the ESCR stated that the ESC, as a treaty, is to be interpreted on the basis of the VCLT "in good faith in accordance with the ordinary meaning to be given to the terms of the

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[278] *Centre on Housing Rights and Evictions (COHRE) v Italy* (n 91); *European Roma Rights Centre (ERRC) v Italy* (27/2004), (2006) 43 E.H.R.R. SE7.
[279] Resolution ResChS (2006) 4 Collective Complaint no. 27/2004 by the European Roma Rights Centre against Italy, Adopted by the Committee of Ministers on 3 May 2006 at the 963rd meeting of the Ministers' Deputies.
[280] Resolution CM/ResChS(2010)8 on the Collective complaint No. 58/2009 by the Centre on Housing Rights and Evictions (COHRE) against Italy, Adopted by the Committee of Ministers on 21 October 2010 at the 1096th meeting of the Ministers' Deputies).
[281] *COHRE v Italy* (n 94), [77].
[282] *International Federation of Human Rights League (FIDH) v France* (n 219).

treaty in their context and in the light of its object and purpose."[283] In the same decision the ECSR noted some other interpretative methods that will be used when interpreting the ESC:

"The Charter was envisaged as a human rights instrument to complement the European Convention on Human Rights. It is a living instrument dedicated to certain values which inspired it: dignity, autonomy, equality and solidarity. The rights guaranteed are not ends in themselves but they complete the rights enshrined in the European Convention of Human Rights… Thus, the Charter must be interpreted so as to give life and meaning to fundamental social rights. It follows inter alia that restrictions on rights are to be read restrictively, i. e. understood in such a manner as to preserve intact the essence of the right and to achieve the overall purpose of the Charter."[284]

As we can see, the ECSR invoked a living instrument approach and emphasized the complementary role of the ESC to the ECHR, thereby signalling its intention to use similar interpretative methods. In its conclusion the ECSR stated that "legislation or practice which denies entitlement to medical assistance to foreign nationals, within the territory of a State party, even if they are there illegally, is contrary to the Charter."[285] It reached this conclusion even though the Revised ESC guarantees the right to nationals of other states only if they are lawfully in the State party.[286] Thereby, it extended the scope of the ESC through its interpretation, not only by interpreting the Charter as a living instrument, but also by using the doctrine of effectiveness.

Before turning to the doctrine of effectiveness, it must be emphasized that the ECSR also used the living instrument doctrine in its later cases.[287] It is particularly interesting to point out that in the *Marangopoulos Foundation for Human Rights (MFHR) v Greece* the ECSR used the living instrument doctrine as a justification, in the light of current conditions, for interpreting the guarantee of the right to health in Article 11 of the Charter as including the right to a healthy environment.[288] The ECSR again invoked not only the living instrument doctrine but also the doctrine of effectiveness. It has been pointed out, in *Marangopoulos* and in other decisions, that the purpose of the ESC is to

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[283] VCLT 1969 (n 178), Article 31(1).
[284] *International Federation of Human Rights League (FIDH) v France* (n 219) [27], [29].
[285] Ibid [32].
[286] Appendix to the Revised ESC.
[287] *World Organisation against Torture (OMCT) v Belgium* (21/2003) (2006) 42 E.H.R.R. SE20 [38]; *Marangopoulos Foundation for Human Rights (MFHR) v Greece* (n 103) [194].
[288] For a detailed analysis of the *Marangopoulos Foundation for Human Rights (MFHR) v Greece* (n 103) see chapter V on the right to a healthy environment.

protect the rights not only theoretically, but also in fact.[289] This statement can be understood as the intention of the ESCR to guarantee the ESC rights so as to make them practical and effective.

The effective guarantee of rights has also been invoked in the housing cases, but in a somewhat different wording. In the housing cases, the ECSR emphasized positive interventions by states needed in order to ensure the effective guarantee of rights.[290] This means that, for example, even when the state introduced legislation it might not be sufficient, but it also needs to implement existing legislation properly.[291] This is not surprising, since the idea that economic and social rights impose positive obligations has been always stressed as one of the main characteristics of the ESC.

Positive obligations imposed on states by the ECSR mostly involve considerable public expenditure. It might have been expected that for that reason the ECSR will use a language suggesting that a state may claim lack of financial resources as a reason for not taking particular action, but this has proven not to be true. On most occasions, claiming a lack of financial resources by the state will not be accepted as a justification. In the text of the ESC, unlike in the text of the ICESCR (Article 2(1)), there is no article drafted in a way that limits an obligation to the availability of resources. The ESC requires states to secure the rights by taking appropriate or necessary measures, but no reference to 'available resources' is made. However, recourse to the lack of available resources may be unavoidable in certain cases, "when the achievement of one of the rights in question is exceptionally complex and particularly expensive to resolve."[292] In such cases the ECSR has stated that "a State Party must take measures that allow it to achieve the objectives of the Charter within a reasonable time, with measurable progress and to an extent consistent with the maximum use of available resources."[293] Resources were also relevant in *Marangopoulos* case where the respondent Government argued that it was following a coherent progressive emissions reduction strategy. While examining their plan for emission reductions, the ESCR concluded that "they do not offer real evidence of Greece's commitment to improving the situation within a reasonable time

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[289] *International Commission of Jurists (ICJ) v Portugal* (n 127), [32]; *Syndicat National des Professions du Tourisme v France* (6/1999), decision on the merits of 10 October 2000 [26].
[290] *COHRE v Croatia* (n 132) [54]; *ERRC v Bulgaria* (n 102) [35]; ERRC *v Italy* (n 278) [35].
[291] *ERRC v Bulgaria* (n 103) [35]; *European Federation of National Organisations Working with the Homeless (FEANTSA) v France* (n 93), [90]-[93].
[292] *International Association Autism-Europe v France* (n 94), [53].
[293] Ibid; *ERRC v Bulgaria* (n 103), [35].

or making such an outcome plausible."[294] Therefore, even bearing in mind that the ECSR will sometimes allow the lack of available resources to be invoked or it will even invoke them itself, most of the time it will not relieve the state of its responsibility under the ESC due to the lack of available resources.

Therefore, the ECSR has often invoked both the living instrument and the doctrine of effectiveness to point out that the Charter rights will not be interpreted restrictively and that it will not allow states to invoke lack of resources to avail themselves of refusing economic and social rights to certain groups within its territory.

On the other hand, the ESC permits restrictions upon all ESC rights using the same formula as found under Articles 8 - 11 of the Convention.[295] Article G of the Revised ESC reads as follows:

"1. The rights and principles set forth in Part I when effectively realised, and their effective exercise as provided for in Part II, shall not be subject to any restrictions or limitations not specified in those parts, except such as are prescribed by law and are necessary in a democratic society for the protection of the rights and freedoms of others or for the protection of public interest, national security, public health, or morals.

2. The restrictions permitted under this Charter to the rights and obligations set forth herein shall not be applied for any purpose other than that for which they have been prescribed."

The ESC thus allows the same use of the proportionality test as the Convention does, under strict conditions and requiring from the states to fulfil all the necessary requirements.[296]

Since the decisions of the ECSR under Collective Complaints procedure are not binding on states like the judgments of the Court are and the protection of the economic and social, as 'weaker' rights, is at stake, one might assume that the ECSR will allow states a wide margin of appreciation. However, that is not the case.[297]Although the ECSR has

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[294] *Marangopoulos Foundation for Human Rights (MFHR) v Greece* (n 103) [207].
[295] David Harris, 'Collective Complaints under the European Social Charter: Encouraging Progress?' in Kaiyan Homi Kaikobad and Michael Bohlander (eds), *International Law and Power: Perspectives on Legal Order and Justice. Essays in Honour of Colin Warbrick* (Martinus Nijhoff Publishers 2009) 10.
[296] For example see *European Trade Union Confederation (ETUC), Confederation of Independent Trade Unions in Bulgaria (CITUB), Confederation of Labour "Podkrepa" (CL "Podkrepa") v Bulgaria*, Collective Complaint No. 32/2005, decision on the merits of 29 November 2006 [46]; *Federation of Finnish Enterprises v Finland* (35/2006), (2008) 47 E.H.R.R. SE6 [30].
[297] It must also be emphasized that the ECSR has balanced the margin of appreciation against limiting principles, such as reasonableness. Cullen (n 274), 89. See *Quaker Council for European Affairs (QCEA) v*

made reference to the margin of appreciation frequently, it has rarely accepted it as to justify the state's behaviour. One example is the *Syndicat des Agrégés de l'Enseignement Supérieur (SAGES) v France*[298] where it stated "The Committee holds that where States Parties establish various consultation bodies that are not directly concerned with the essential trade union prerogatives such as collective bargaining they have a wide margin of appreciation in determining the composition of the bodies in question."[299]

On most occasions the ECSR, when deciding whether states have a wide or narrow margin of appreciation, decided that the margin of appreciation attributed to states is narrow. Therefore, when balancing respect for state discretion and protection of the ESC rights, the ECSR decided in favour of the ESC rights. For example, in *Centre on Housing Rights and Evictions (COHRE) v Croatia* the ECSR acknowledged that states do enjoy a certain margin of discretion in making decisions on their social policy or in determining the steps to be taken to ensure compliance with the Charter.[300] Yet, it found that this margin of discretion was not wide and that it was the state's obligation to secure the rights concerned in each case, finding a violation of the rights in question. It is also interesting to note that, in *COHRE v Italy* the ECSR stated "if discretion must be left to the competent national authorities, the margin will tend to be narrower where the right at stake is crucial to the individual's effective enjoyment of intimate or key rights (see, *mutatis mutandis*, European Court of Human Rights, *Connors v the United Kingdom*, judgment of 27 May 2004, § 82). Where a particularly important facet of an individual's existence or identity is at stake, the discretion allowed to the State will be restricted (see, *mutatis mutandis*, European Court of Human Rights, *Evans v the United Kingdom* [GC], judgment of 10 April 2007, § 77)."[301]

As we can see, the ECSR has used largely the same interpretative methods as the Court. On numerous occasions it has invoked the jurisprudence of the Court in support of its interpretation of the ESC. Also, where there is an ESC right that has an equivalent in

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Greece (8/2000), decision on the merits of 27 April 2001, where the ECSR recognised that arrangements for alternative civil service were within the state's margin of appreciation, but still found that the much greater length of alternative civil service as compared with compulsory military service was outside reasonable limits.

[298] It accepted it also in the *European Council of Police Trade Unions (CESP) v Portugal* (37/2006), (2008) 47 E.H.R.R. SE4.

[299] *Syndicat des Agrégés de l'Enseignement Supérieur (SAGES) v France* (26/2004), (2005) 41 E.H.R.R. SE21 [38].

[300] *COHRE v Croatia* (n 132), [63]-[64].

[301] *COHRE v Italy* (n 94), [120].

the Convention, the ECSR interprets the Charter so as to be in harmony with the Convention.[302]

Let me now turn to the issue of the Court's extensive interpretation of the Convention's rights where they consist of significant socio-economic elements and the possible solutions to those problems. By reading into the Convention the right to have satisfactory detention conditions and healthcare in prisons, the right to a healthy environment, the right to healthcare in general and the right to adequate housing, the Court is creating numerous difficulties for the states. It reads in rights to which the states have not agreed when signing the Convention, rights already guaranteed under the ECPT and the ESC, and the execution of judgments concerning those rights is often surrounded with numerous difficulties. It will be argued that the protection of these rights is better left for the machineries of protection established under the ECPT and the ESC.

[302] Khaliq and Churchill, 'The European Committee of Social Rights: putting flesh…' (n 29), 433-435. See, for example *Quaker Council for European Affairs v Greece* (n 297), [22]; *International Association Autism-Europe v France* (n 94), [52] or; *COHRE v Italy* (n 94), [120].

CHAPTER IV

THE RIGHT TO SATISFACTORY DETENTION CONDITIONS AND THE RIGHT TO HEALTHCARE IN PRISONS

4.1 INTRODUCTION

Article 3 of the Convention prohibits torture and inhuman or degrading treatment or punishment under the Convention. It is one of the most important articles within the Convention and one of the rare articles that contain an absolute prohibition of any limitations on the rights it protects. What I will show through this chapter is that nowadays the nature of Article 3 as a fundamental right has been seriously compromised through the Court's interpretation of Article 3 as guaranteeing satisfactory detention conditions and healthcare of a certain standard in prisons. It will be questioned whether it is really necessary for the Court to deal with detention conditions and healthcare in prisons under Article 3 or whether there are not other means within the CoE for dealing with those rights.

In the first section of this chapter some general remarks on Article 3 will be given, followed by an introduction to the Court's case-law finding violations of Article 3 based solely on poor detention conditions and unsatisfactory healthcare in prisons. Next, the chapter will introduce the European Committee for the Prevention of Torture (the CPT), which is a non-judicial body established under the ECPT that deals exclusively with detention conditions and healthcare in prisons. Since the majority of the Court's judgements concerning detention conditions and the healthcare in prisons, as well as the CoM supervision process, are very much influenced and supported by findings of the CPT as set out in its reports, the important aspects of the CPT and its work will be presented.

Thereafter, the Court's jurisprudence on unsatisfactory detention conditions and healthcare in prisons will be analysed. This jurisprudence has significant socio-economic elements, particularly in their execution. Providing satisfactory detention conditions and healthcare in prisons of a certain standard usually concerns a large group of detainees

and can be only achieved progressively through the involvement of large financial resources. For this reason it takes years for a state to execute a judgment of the Court in its entirety. Because of this problem, the supervision of the execution of judgments, which is the responsibility of the CoM, will also be analysed together with the CoM's reports on the current state of execution of those judgments.

Furthermore, the CPT has developed numerous standards concerning healthcare in prisons and detention conditions which it takes into account when examining whether they are being respected by the state and they will be briefly discussed. The CPT has been shown to be an effective body in supervising whether the states are improving their detention conditions and healthcare in prisons and states have shown willingness to co-operate with the CPT and follow its recommendations. In the final part of the chapter it will be argued not only that guaranteeing healthcare of a certain standard in prisons and adequate detention conditions would not be threatened if the Court left those matters for the CPT, but also that it would be desirable for the CPT to deal exclusively with those issues.

4.2 ARTICLE 3- PROHIBITION OF TORTURE, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT

Article 3 of the Convention prohibits torture and inhuman or degrading treatment or punishment and, as already stated, it contains an absolute prohibition of any limitations on the rights (principles) it protects.[303] There is no second paragraph of this Article (as with Articles 8-11) which would allow exceptions and the rights contained in it cannot be limited in a way that most other articles can. Also, it is not subject to derogation under Article 15 (2) of the Convention. The Court has never permitted any ill-treatment that would fall within the scope of Article 3, even for the most pressing reasons of public interest and irrespective of the victim's conduct.[304] The unconditional wording of Article 3 renders the motivation for the alleged treatment irrelevant: the ends can never justify the means. This strict approach is mitigated by the severity threshold that must

[303] For more on Article 3 see Harris, O'Boyle and Warbrick (n 25), 69-113; Mowbray, *Cases and Materials on the European Convention on Human Rights* (n 23), 145-229; White and Ovey (n 27), 167-195; Janis, Kay and Bradley (n 26), 168-227; and Aisling Reidy, *The Prohibition of Torture, A guide to the implementation of Article 3 of the European Convention on Human Rights* (Human Rights handbooks, no. 6, CoE Publishing 2003).
[304] *Aksoy v Turkey* (2002) 34 E.H.R.R. 57; *Soering v United Kingdom* (n 218); *Chahal v United Kingdom* (1997) 23 E.H.R.R. 413.

be satisfied under Article 3. When the Court is determining whether there is a violation of Article 3, it will never apply the principle of proportionality (as it does with Articles 8-11). Introducing a proportionality test would threaten to undermine the absolute nature of the Article 3 protection as it would permit justifications for ill-treatment.[305]

Torture and inhuman and degrading treatment and punishment are not defined in the Convention so it has been up to the Court to define those terms. It did so in one of the first cases where Article 3 was in question, *Ireland v United Kingdom.*[306] The Court defined the terms as follows: torture: "deliberate inhuman treatment causing very serious and cruel suffering"; inhuman treatment or punishment: "the infliction of intense physical and mental suffering"; and degrading treatment: "ill-treatment designed to arouse in victims feelings of fear, anguish, and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance."[307]

When deciding whether a violation of Article 3 occurred and whether it represents torture or inhuman or degrading treatment or punishment, the Court takes into account all the circumstances of every case individually. The Court itself stated that the assessment of the minimum level of severity is, in the nature of things, relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim.[308]

What is relevant for this chapter is the Court's dynamic interpretation of Article 3 and its application of the living instrument doctrine. In as early as 1978 in the *Tyrer* judgement the Court's judges stated that Convention is a 'living instrument' that must be interpreted in the light of present-day conditions rather than what the drafters thought back in 1950.[309] That also means that the notion of what constitutes torture, inhuman and degrading treatment has changed over time within the Court's jurisprudence. It is important to read the Convention in terms of current expectations, heightened standards may now more readily lead to the conclusion that certain ill-treatment that might have been labelled as inhuman treatment now justifies the

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[305] Although that is exactly what the House of Lords did in the *R. (on the application of Munjaz) v Ashworth Hospital Authority (now Mersey Care NHS Trust)* (2005) 3 W.L.R. 793.
[306] *Ireland v United Kingdom* (n 196).
[307] Ibid [167].
[308] Ibid [162].
[309] *Tyrer v United Kingdom* (n 215), [31].

application of the label torture,[310] or even that the treatment of prisoners or detention conditions that used to be labelled only as unsatisfactory might now be regarded as violation of Article 3.

Also, the Court pointed out that the circumstances which may give rise to a breach of Article 3 are not limited. In *Pretty v United Kingdom*, a case concerned with voluntary euthanasia, the Court commented that: "In light of the fundamental importance of Article 3, the Court has reserved to itself sufficient flexibility to address the application of that Article in other situations that might arise."[311] This might be an explanation for why the Court over time started interpreting Article 3 so as to include unsatisfactory detention conditions and poor medical treatment in detention.[312] Before presenting the most relevant cases under Article 3 concerning detention conditions and healthcare in prisons, a short presentation of the CPT will be given since numerous Court's judgments that will be discussed have very much been influenced by the CPT findings.

4.3 THE CPT IN GENERAL AND ITS IMPACT ON THE WORK OF THE COURT

The CPT has been established under the ECPT which has been ratified by all Member States of the CoE.[313] The work of CPT is designed to be an integral part of the CoE system for the protection of human rights, as a proactive non-judicial mechanism.[314] Under the ECPT, the CPT is set up to conduct periodic and *ad hoc* visits in any places under the jurisdiction of a contracting state where persons are deprived of liberty to see how they are treated and, if necessary, to recommend improvements. The CPT produces two categories of documents: the annual general reports that describe its work during the past year and may also contain some substantive issues and general standards, and individual country reports arising out of the CPT's programme of visits. The essential features of the ECPT are principles of co-operation and confidentiality

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310 *Selmouni v France* (n 10) [101].
311 *Pretty v United Kingdom* (2002) 35 E.H.R.R. 1 [32]–[33].
312 For more on the development of positive obligations under Article 3 of the Convention see Mowbray, *The Development of Positive Obligations*… (n 23), 43-67.
313 The ECPT, Article 1. For more on the CPT see Rod Morgan and Malcom Evans (eds), *Protecting Prisoners, The Standards of the European Committee for the Prevention of Torture in Context* (OUP 1999); and the CPT website <http://www.cpt.coe.int/en/> accessed 1 July 2012.
314 The CPT Standards, "Substantive" sections of the CPT's General Reports, CPT/Inf/E (2002) 1 - Rev. 2011, 4.

between the CPT and State parties. Each State party must permit visits and no reservations are allowed in respect to any of the provision of the ECPT. When carrying out visits the CPT enjoys extensive power under the ECPT: access to the territory of the state and the right to travel without restrictions, full information on places where persons deprived of their liberty are being held, unlimited access to any place where persons are deprived of their liberty, including the right to move inside those places without restrictions and access to all information available to the states which is necessary for the CPT to carry out its task.[315] During its visit the CPT is likely to focus on two issues: whether there are indications suggesting that violence or unnecessary force have been used against detainees, and whether detention conditions and treatment regimes are adequate. Since it is not the role the of the CPT to establish whether there has been a breach of Article 3, the CPT has not found it necessary to provide a clear definition of the terms "torture" or "inhuman" or "degrading" treatment. However, the CPT has developed a set of standards which it employs during its visits and which apply to all persons in all places of detention. These CPT standards are promulgated in its annual/general reports and in country reports.[316]

The Explanatory Report to the ECPT indicated that the CPT itself was not to "seek to interfere in the interpretation and application of Article 3."[317] However, in reality there is a two way relationship between the Court and the CPT. Decisions made under the Court guide the CPT, and the findings of the CPT may both stimulate petitions and even directly influence the application of Article 3.[318] When challenging detention conditions as incompatible with Article 3 requirements, applicants have sought to rely upon CPT findings in two situations: in establishing the factual background to conditions of detention and in an attempt to persuade the Court to condemn the treatment of the applicant through finding a violation of Article 3.[319]

As already mentioned, the majority of the Court's judgements concerning detention conditions are very much supported by the CPT findings stated in their reports, both

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315 ECPT, Article 8(2).
316 See more in Section 4.8.
317 ECPT, Explanatory Report (CPT: Reference Documents CPT/Inf/C (89) 1 [EN] (Part 2), Strasbourg, 26.XI.1987), [27].
318 Rod Morgan and Malcom Evans, *Combating torture in Europe: the work and standards of the European Committee for the Prevention of Torture (CPT)* (CoE Publishing 2001), 59.
319 Jim Murdoch, *The Treatment of Prisoners: European Standards* (CoE Publishing 2008), 47.

the general ones and reports regarding a specific country.[320] What is also important to mention is that not only does the Court rely on CPT findings when it finds that detention conditions are not in conformity with Article 3, but the Court has also been persuaded when the CPT has labelled conditions of detention as acceptable.[321] Even if the CPT delegation has not visited the actual detention centre where the applicant has been held, the Court can use the findings made by the CPT on its visit to a facility similar to the one where the applicant is being held.[322] All of this suggests that the work of the CPT makes a significant and crucial contribution in the area of treatment of persons deprived of their liberty and that the Court now has the opportunity of understanding the long-term impact of poor detention conditions upon individuals. The CPT's cooperation with state authorities and with non-governmental organisations, its unrestricted access to all of a state's detention facilities and all detainees and the high impact the CPT has on the Court's judgements have made the CPT an important contributor to the protection of prisoners in Europe.

4.4 VIOLATIONS OF ARTICLE 3 BASED SOLELY ON POOR DETENTION CONDITIONS AS A RESULT OF DYNAMIC AND EVOLUTIVE INTERPRETATION OF THE CONVENTION

Conditions of detention refer to the general environment in which persons are detained, to the prison regime and specific conditions in which inmates are kept, and to the specific circumstances of the prisoner.[323] At first the judges were very reluctant to find violations of Article 3 based solely on poor prison conditions. This is an area where there has been a continuous evolution in the basic standards, since, as already mentioned, in earlier case-law the Court and the former Commission seemed reluctant to conclude that conditions of detention violated Article 3 (except in the *Greek case*).[324] Already in the 1980s, in *Kröcher and Möller v Switzerland*[325] violations of international standards of detention were acknowledged, but no violation of Article 3 was found. The applicants were locked up separately in two non-adjacent cells. The cells on their floor

[320] *Alver v Estonia* (2006) 43 E.H.R.R. 40; *Fedotov v Russia* (2007) 44 E.H.R.R. 26; *Khokhlich v Ukraine* App no 41707/98 (ECtHR, 29 April 2003).
[321] *Ramirez Sanchez v France* (2007) 45 E.H.R.R. 49 [130].
[322] *Dougoz v Greece* (n 81).
[323] For more on the European standards on the treatment of prisoners see Murdoch (n 318).
[324] *Greek case* (n 221).
[325] *Kröcher and Möller v Switzerland* (1984) 6 E.H.R.R. CD395 [60]-[77].

and above and below theirs had been evacuated. Both applicants were soon placed under surveillance by closed-circuit television with a 60-watt lamp continuously kept on in their cells. During weekends the applicants could not leave their cells at all and had no newspapers, magazines, radio or television. Their watches and diaries had been taken away from them. They were deprived of any contact with each other as well as with other prisoners and could not be visited by their lawyers and kept in conditions of solitary confinement in the full sense of the term. The Commission considered that the special conditions imposed on the applicants could not be construed as inhuman or degrading treatment within the meaning of Article 3. However, there were already members of the Commission that expressed a dissenting opinion. They considered that there was a violation of Article 3 in this case and according to them, the majority's case appeared to rest on the fact that the conditions of detention imposed on the applicants were particularly severe during the first month but that conditions were subsequently relaxed one by one. According to the dissenting members, closer attention should have been paid to the situation imposed on the applicants during the first month of their detention and this considered in the light of Article 3. The fact that a situation prohibited by Article 3 was gradually released did not mean that that situation could be justified retroactively in regard to that provision.[326]

The first clear indication that poor physical conditions of detention can constitute degrading treatment even though there is no intention to humiliate detainees appeared in 2001 in *Dougoz v Greece.* A convicted foreign drugs offender was held for 10 months in Drapetsona detention centre and for eight months in Alexandras Avenue police headquarters. Both of these locations were severely overcrowded and there were no beds, mattresses or blankets. The Court unanimously decided that:

"…conditions of detention may sometimes amount to inhuman or degrading treatment. In the "Greek case" (applications nos. 3321/67, 3322/67, 3323/67 and 3344/67, Commission's report of 5 November 1969, Yearbook 12) the Commission reached this conclusion regarding overcrowding and inadequate facilities for heating, sanitation, sleeping arrangements, food, recreation and contact with the outside world. When assessing conditions of detention, account has to be taken of the cumulative effects of these conditions, as well as of specific allegations made by the applicant… In the light of the above, Court considers that the conditions of detention of the applicant at the Alexandras police headquarters and the Drapetsona detention centre, in particular the serious overcrowding and absence of sleeping facilities,

[326] Ibid, Dissenting Opinions of Judges Messers, Tenekides, Melchior, Sampaio and Weitzel.

combined with the inordinate length of the period during which he was detained in such conditions, amounted to degrading treatment contrary to Article 3."[327]

In classifying Dougoz's conditions of detention as representing degrading treatment, the Court was very much influenced by the findings and the criticism of the CPT regarding Alexandras police headquarters and the Drapetsona detention centre.[328]

Shortly after the *Dougoz* case the Court found another breach of Article 3 in *Peers v Greece*.[329] The applicant was a British drug addict who was detained in the segregation unit for two months while he underwent drug withdrawal treatment. The Court determined:

"The Court takes into account, in particular, that, for at least two months, the applicant had to spend a considerable part of each 24-hour period practically confined to his bed in a cell with no ventilation and no window, which would at times become unbearably hot. He also had to use the toilet in the presence of another inmate and be present while the toilet was being used by his cell-mate. The Court is not convinced by the Government's allegation that these conditions did not affect the applicant in a manner incompatible with Article 3. On the contrary, the Court is of the opinion that the prison conditions complained of diminished the applicant's human dignity and aroused in him feelings of anguish and inferiority capable of humiliating and debasing him and possibly breaking his physical or moral resistance. In sum, the Court considers that the conditions of the applicant's detention in the segregation unit of the Delta wing of Koridallos Prison amounted to degrading treatment within the meaning of Article 3 of the Convention."[330]

What the Court also took into account was whether the competent authorities took any steps to improve the objectively unacceptable conditions of the detention. Since in this case, no steps were taken, that kind of omission showed a lack of respect for the applicant. This kind of reasoning might lead us to the conclusion that the Court will put great importance on whether there was an effort on the part of the state to improve detention conditions when deciding if a violation occurred. Nevertheless, it has turned out that the greatest relevance will be given to the objective conditions of the detention. Also, already here the Court has expressed its opinion that even when the suffering has been endured for a relatively short period of time a violation of Article 3 might occur.

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[327] *Dougoz v Greece* (n 81) [46] and [48].
[328] Ibid [47]-[48].
[329] *Peers v Greece* (2001) 33 E.H.R.R. 51.
[330] Ibid [75].

Furthermore, unlike in *Krocher and Muller*, in *Price v United Kingdom*[331] the Court stated that even a few days of detention in unacceptable conditions might be enough to constitute an Article 3 violation. The applicant, a four-limb-deficient thalidomide victim with numerous health problems, including defective kidneys, committed contempt of the court in the course of civil proceedings and was ordered by a judge to be detained for seven days (although, as a result of the rules on remission of sentences, she was in fact detained for three nights and four days). During her first night of detention the applicant was kept in a cell in a local police station because it was too late in the day to take her to prison. The custody record showed that she was complaining of the cold every half hour – a serious problem for the applicant who suffered from recurring kidney problems and who, because of her disability, could not move around to keep warm. Finally, a doctor was called, who noted that the applicant could not use the bed and had to sleep in her wheelchair, that the facilities were not adapted to the needs of a disabled person and that the cell was too cold. The Court noted that, despite the doctor's findings, no action was taken by the police officers responsible for the applicant's custody to ensure that she was removed to a more suitable place of detention, or released. Instead, the applicant had to remain in the cell all night, although the doctor did wrap her in a spare blanket and gave her some painkillers. There was no evidence in this case of any positive intention to humiliate or debase the applicant. However, the Court considered that to detain a severely disabled person in conditions where she was dangerously cold, risked developing sores because her bed was too hard or unreachable, and was unable to go to the toilet or keep clean without the greatest of difficulty, constituted degrading treatment contrary to Article 3 of the Convention.[332]

Dougoz, *Peers,* and *Price* were some of the first cases regarding poor detention conditions that showed the Court's willingness to find violations of Article 3 based solely on unacceptable living conditions. A whole new arena of possible applications that might come before the Court was created, and soon after these judgments, numerous applications, particularly from the applicants under the jurisdiction of states that generally have poor detention facilities, came before the Court.

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331 *Price v United Kingdom* (2002) 34 E.H.R.R. 53.
332 Ibid [30].

One of the most important cases regarding poor detention conditions is *Kalashnikov v Russia.*[333] It was one of the first Russian cases before the Court concerning detention conditions and after it, a large number of applications concerning unacceptable detention conditions in Russian prisons came before the Court. The conditions in most Russian detention facilities are below all standards established by the CPT or by the Court. In this particular case Mr Kalashnikov, a bank manager who had been charged with embezzlement and placed in detention on remand in June 1995, complained that the conditions and duration of his detention were in breach of Article 3. Mr Kalashnikov was convicted in August 1999 and sentenced to five years and six months' imprisonment, running from June 1995, but in March 2000 he was acquitted of a new charge of misappropriation of property and three months later he was released from prison following an amnesty. The Court upheld his complaint and held that the duration of Mr. Kalashnikov's detention, taken with the cramped and unsanitary conditions in which he had been held, violated Article 3 as they amounted to degrading treatment. He had been forced to endure overcrowding and poor sleeping conditions, and as a result he had contracted skin diseases and fungal infections over a period of four years and 10 months. Even the Government in its response to the allegations, confirmed that "It was acknowledged that, for economic reasons, conditions of detention in Russia were very unsatisfactory and fell below the requirements set for penitentiary establishments in other Member States of the Council of Europe."[334] The Court noted the Government's acknowledgement but it did not find economic problems a sufficient reason to lower its standards regarding detention conditions. The Court declared that due to "severely overcrowded and unsanitary environment and its detrimental effect on the applicant's health and well-being, combined with the length of the period during which the applicant was detained in such conditions,"[335] the applicant's conditions of detention amounted to degrading treatment.

After the *Kalashnikov* case, numerous Russian cases came before the Court, such as *Guliyev v Russia*;[336] *Kantyrev v Russia*;[337] *Igor Ivanov v Russia*;[338] *Andrey Frolov v Russia*;[339] *Labzov v Russia*;[340] *Babushkin v Russia*;[341] and *Trepashkin v Russia.*[342]

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[333] *Kalashnikov v Russia* (n 134).
[334] Ibid [94].
[335] Ibid [102].
[336] App no 24650/02 (ECtHR, 19 June 2008).
[337] App no 37213/02 (ECtHR, 21 June 2007).
[338] App no 34000/02 (ECtHR, 7 June 2007).

Regarding poor detention conditions, the Court has shown its determination in not creating two sets of standards within Council of Europe, that is, in not taking into account the economic situation in the country. As in *Kalashnikov* case, in *Poltoratskiy v Ukraine* the Court noted that Ukraine was encountering serious economic problems. However, again it observed that lack of resources could not in principle justify prison conditions which were so poor as to reach the threshold of treatment contrary to Article 3. The economic problems faced by Ukraine could not in any event explain or excuse the particular conditions of detention which the Court found to be unacceptable in that case.[343]

Furthermore, numerous cases concerning poor detention conditions came from Bulgaria, which was also encountering economic problems, for example *Kehayov v Bulgaria,*[344] *Dobrev v Bulgaria*,[345] and *Stoyan Dimitrov v Bulgaria.*[346] These cases concerned poor conditions of the applicants' detention between 1996 and 2000, amounting to degrading treatment, in different detention facilities of the Investigation Service and prisons. For example, in the *Kehayov* case between 25 December 1997 and 16 June 1998 the applicant was kept in a lock-up at the Regional Investigation Office in Plovdiv. According to the applicant, the cell, where he was detained together with three other people, measured 3 x 3.5m (a surface area of 10.5 m^2). Since there were no beds, the detainees slept on mattresses on the floor. Also, the blankets were not washed regularly. The cell did not have access to daylight and was equipped with a 100W electric lamp. There was a ventilation system, but according to the applicant the ventilation system was only installed in 1998. He also submitted that in winter the temperature in his cell did not rise above 10-12 C^o. The Government disputed these allegations.[347] The CPT reports on its visit to Bulgaria were used in the Court's assessment.[348] The Court considered that the fact that the applicant had to spend practically 24 hours per day during nearly six months in an overcrowded cell without exposure to natural light and without any possibility for physical and other out-of-cell activities must have been

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339 App no 205/02 (ECtHR, 29 March 2007).
340 App no 62208/00 (ECtHR, 16 June 2005).
341 App no 67253/01 (ECtHR, 18 October 2007).
342 App no 36898/03 (ECtHR, 19 July 2007).
343 *Poltoratskiy v Ukraine* (2004) 39 E.H.R.R. 43 [148].
344 (n 134).
345 App no 55389/00 (ECtHR, 10 August 2006).
346 App no 36275/02 (ECtHR, 22 October 2009).
347 *Kehayov v Bulgaria* (n 134) [37]-[38].
348 Ibid [43]-[55] and [66].

detrimental to his health and must have caused intense suffering. The Court did not accept the applicant's contention that the detention conditions were intended to degrade or humiliate him, however, there was little doubt that certain aspects of the stringent regime could be seen as humiliating. In conclusion, the Court stressed that "While the Court does not underestimate the financial difficulties invoked by the Government before the CPT, it observes that a number of improvements recommended by the CPT did not require significant resources but were not implemented... Having regard to the cumulative effects of the unjustified stringent regime to which the applicant was subjected, the material conditions in the cell and the time spent therein, the Court considers that the hardship he endured exceeded the unavoidable level inherent in detention and finds that the resulting suffering went beyond the threshold of severity under Article 3 of the Convention. It follows that there has been a violation of that provision."[349] As can be seen, the Court again relied on the CPT reports on its visits to Bulgaria when deciding whether the detention conditions were in conformity with the Article 3 demands or they violated that provision.

Finally, one of the recent cases concerning poor detention conditions which show the extent of this systematic problem will be analysed. In *Orchowski v Poland*[350] the applicant was detained at various times in eight different detention facilities involving frequent transfers back and forth between institutions from the date he lodged his application (2004) until the date of the Court's judgement (2009). All of his complaints were rejected as manifestly ill-founded by the Polish courts. The applicant submitted that his cell during his first detention measured 17 m^2 and was shared by ten detainees, including the applicant,[351] and in other cells it was also less than $3m^2$ per person. He also complained that he had been allowed to spend a very limited amount of time outside the cell and that the sanitary conditions in the detention facilities in question were inadequate. He stressed that the problem of overcrowding in Polish prisons was systemic and that it was widespread and persistent.[352] The Court found a violation of Article 3 and it pointed out that approximately 160 applications were at that time raising an issue under Article 3 of the Convention with respect to overcrowding and consequential inadequate living and sanitary conditions only in Poland. The Court concluded that from 2000 until at least mid-2008 overcrowding in Polish prisons and

[349] Ibid [72]-[75].
[350] *Orchowski v Poland* (n 134).
[351] Ibid [16].
[352] Ibid [115].

remand centres revealed a structural problem consisting of a practice that was incompatible with the Convention. It stressed that:

"In this connection, it is to be reiterated that, where the Court finds a violation, the respondent State has a legal obligation under Article 46 of the Convention not just to pay those concerned the sums awarded by way of just satisfaction under Article 41, but also to select, subject to supervision by the Committee of Ministers, the general and/or, if appropriate, individual measures to be adopted in their domestic legal order to put an end to the violation found by the Court and to redress so far as possible the effects…The respondent State remains free, subject to monitoring by the Committee of Ministers, to choose the means by which it will discharge its legal obligation under Article 46 of the Convention, provided that such means are compatible with the conclusions set out in the Court's judgment."[353]

The Court emphasized that it was aware of the fact that solving a systemic problem of overcrowding in Poland might necessitate the mobilisation of significant financial resources. However, again it pointed out that lack of resources could not in principle justify prison conditions which were so poor as to reach the threshold of treatment contrary to Article 3 and that it was incumbent on the respondent Government to organise its penitentiary system in such a way that ensured respect for the dignity of detainees, regardless of financial or logistical difficulties.[354]

This and similar cases strengthen the position of other potential claimants who complain of the conditions of their detention. They also reflect the changing scope of the Convention, so that conditions which might not have been considered so bad as to constitute a violation some years ago will now constitute a breach in light of the prevailing standards and expectations of the day. The Court is reading more and more into Article 3 rights. It not only requires a state to refrain from treating people under its jurisdiction in a way that constitutes torture or inhuman or degrading treatment or punishment but is placing numerous positive obligations on states. Some of these obligations are to have detention conditions of a certain standard as well as healthcare in detention centres. In a large way, the work of the CPT has contributed to creating these standards.

The question now is what is the practical value of delivering judgements on poor detention conditions when it comes to the execution of judgements? The process of the

[353] Ibid [148].
[354] Ibid [149].

execution of judgments concerning poor detention conditions will therefore now be examined, followed by the cases concerning healthcare in detention.

4.5 EXECUTION OF THE JUDGEMENTS CONCERNING POOR DETENTION CONDITIONS

In *Poltoratskiy v Ukraine* the Court stated:

"However, the Court observes that lack of resources cannot in principle justify prison conditions which are so poor as to reach the threshold of treatment contrary to Art.3 of the Convention. Moreover, the economic problems faced by Ukraine cannot in any event explain or excuse the particular conditions of detention which it has found in paragraph 145 to be unacceptable in the present case."[355]

As we can see, the Court has not accepted lack of resources as an excuse for unacceptable detention conditions. However, when it comes to the execution of judgements the lack of resources and the economic difficulties that the Ukraine is going through are of relevance. The same goes for Russia and Bulgaria and their prisons, as will be shown here.

Some of the judgments presented above are up to 10 years old. Now, years later, they are still on the list of pending cases and the CoM is reporting on their current state of execution. The situation in prisons and other detention centres is gradually improving. However, this gradual improvement does not represent what civil and political rights protection was to be about. One of the major distinctions between economic and social and civil and political rights is that obligations in relation to the former are usually limited to the steps that can be taken within 'available resources'.[356] And this is exactly what is happening now with the Convention rights.

First, the *Poltoratskiy* group of cases including *Poltoratskiy* as well as several other Ukrainian cases: *Aliev*;[357] *Kuznetsov*;[358] *Dankevich*;[359] *Khokhlich*;[360] and *Nazarenko*[361] will be briefly looked at. These cases concern poor conditions of the applicants' detention

[355] *Poltoratskiy v Ukraine* (n 343) [148].
[356] See chapter II (2.3).
[357] App no 41220/98 (ECtHR, 29 April 2003).
[358] App no 39042/97 (ECtHR, 29 April 2003).
[359] App no 40679/98 (ECtHR, 29 April 2003).
[360] (n 320).
[361] App no 39483/98. (ECtHR, 29 April 2003).

between 1996 and 2000 on "death row" in four different prisons in Ukraine, found by the Court to amount to degrading treatment due in particular to their prolonged confinement in a very restricted living space without natural light and the virtual impossibility of any activity or human contact (violations of Article 3). Although the detention conditions of the applicants were unsatisfactory and violated Article 3, the CoM in its examination of these cases concluded that since the applicants were no longer awaiting execution of capital sentence no measures were necessary.[362]

However, to contextualise the situation in Ukraine regarding implementation of general measures in cases where detention conditions are unsatisfactory (together with the lack of medical assistance) we will later in the chapter have a look at the CoM report on the *Nevmerzhitsky* group of cases.[363]

As to the CoM report on the *Kehayev v Bulgaria* which is being supervised together with several other Bulgarian cases that concern violation of Article 3 due to the poor detention conditions (together with various other violations), the CoM noted that on 15/05/2012 the authorities submitted two action reports, one concerning this whole group of cases, one concerning the *Kashavelov* case and the specific issues it raises. As to the individual measures in light of the information provided by the authorities in their revised action report, no further individual measures appear necessary in several cases while other cases are still under examination in this group. Regarding general measures the CoM noted that the revised action report of 15/05/2012 in the *Kehayov* group describes the measures taken and envisaged for the execution of these judgments regarding poor conditions of detention. As we can see, the CoM only noted the information provided by the authorities and these judgments are still on the list of pending cases waiting to be executed.[364]

Regarding the so called *Kalashnikov* group of cases (besides the *Kalashnikov* case, it includes *Benediktov*,[365] *Andrey Frolov*,[366] *Labzov*,[367] *Mayzit*,[368] *Novoselov*[369] and 25 other cases)

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362 Current state of execution, *Poltoratskiy v Ukraine*, <http://www.coe.int/t/dghl/monitoring/execution/Reports/pendingCases_en.asp?CaseTitleOrNumber=Poltoratskiy&StateCode=UKR&SectionCode=> accessed 17 July 2012.
363 See Section 4.6.
364 Current state of execution, *Kehayev v Bulgaria*, <http://www.coe.int/t/dghl/monitoring/execution/Reports/pendingCases_en.asp?CaseTitleOrNumber=&StateCode=BGR&SectionCode=> accessed 17 July 2012.
365 App no 106/02 (ECtHR, 10 May 2007).
366 (n 339).
367 (n 340).

the CoM stated that these cases concern the poor conditions under which the applicants were detained in remand prisons (SIZOs) between 1995 and 2008 which were found by the Court to amount to degrading treatment, due in particular to severe overcrowding and an unsanitary environment (violations of Article 3).[370]

As to the general measures, the CoM stated that the measures taken by the Russian authorities are summarised in Interim Resolution ResDH(2003)123 and that since then the authorities have regularly provided information on the measures adopted and envisaged.[371] In its Resolution the CoM called upon the Russian authorities to continue to enhance the ongoing reforms with a view to aligning the conditions of all pre-trial detention on the requirements of the Convention, particularly as set out in the *Kalashnikov* judgment, so as to effectively prevent new, similar violations and invited the authorities to continue to keep the CoM informed of the concrete improvement of the situation, in particular by providing relevant statistics relating to the overcrowding and sanitary and health conditions in pre-trial detention facilities. This Resolution was adopted in 2003 and since then the CoM has not recommended any particular measures or pressured Russia to speed up the execution of these judgments. Just like with the *Kehayev* group of cases, there is still a lot of work left for the authorities in order for them to have detention conditions in conformity with the requirements set out under Article 3 and it does not seem that the CoM is ready to place political or other pressure on states or issue new resolutions.

In relation the even older cases, to be accurate the first cases regarding detention conditions (*Dougoz v Greece* and *Peers v Greece*), in its declassified Introductory Memorandum on the Implementation of judgments of the European Court on Human Rights the Committee of Legal Affairs and Human Rights (CLAHR) from May 2008, the CoM stated:

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368 App no 63378/00 (ECtHR, 20 January 2005).
369 App no 66460/01(ECtHR, 02 June 2005).
370 Current state of execution, *Kalashnikov v Russia*, <http://www.coe.int/t/dghl/monitoring/execution/Reports/pendingCases_en.asp?CaseTitleOrNumber=&StateCode=RUS&SectionCode=> accessed 15 June 2012.
371 Interim Resolution ResDH(2003)123 concerning the judgment of the European Court of Human Rights of 15 July 2002, final on 15 October 2002 in the case of Kalashnikov against the Russian Federation (Adopted by the Committee of Ministers on 4 June 2003 at the 841st meeting of the Ministers' Deputies).
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"3. A number of important measures have been implemented in order to prevent prison overpopulation. A new transfer centre for detainees opened in Athens and one of its wings, with a capacity of 208 men, 150 women and 20 minors, for the exclusive use of detainees pending deportation...

4. Despite the above-mentioned positive measures, further major improvements of detention conditions in prisons are necessary especially, in the light of the concerns expressed in the 2005 report of European Committee against Torture (CPT/Inf(2006)41) and in the Council of Europe Human Rights Commissioner's follow-up Report on Greece (CommDH(2006)13)."[372]

The Final Resolutions on the *Dougoz* and *Peers* cases have been finally adopted. In its Appendix to the Resolution on the Information about the measures to comply with the judgment in cases *Peers* and *Dougoz* the CoM presented all the measures that were introduced in order for these judgments to be executed.[373] These included all the necessary reparations that were made on the prisons and other detention conditions, refurbishments, appropriate medical staff, construction of new prisons, special measures introduced for preventing prison overpopulation, training of prison staff, continuing improvement of prison conditions and numerous other measures. It took years to introduce all those measures, including great financial expenses.

It is apparent from these reports how complex and financially demanding the execution of judgments concerning detention conditions are. What is also visible is the lack of pressure coming from the CoM. These reports also show us a certain degree of state willingness to respect the judgments and progress in improving detention conditions. Therefore, we cannot put the fault for the non-execution of the Court's judgment entirely on states.

Later in the chapter my arguments in favour of providing the CPT with the full authority to deal exclusively with the detention conditions and issues of provision of medical service in detention will be presented. What will be discussed now is the case-law concerning the issue of providing a healthcare of a certain standard in detention.

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[372] Introductory Memorandum on the Implementation of judgements of the European Court on Human Rights the Committee of Legal Affairs and Human Rights from 26 May 2008, <http://assembly.coe.int/CommitteeDocs/2008/20080526_ajdoc24_2008.pdf> accessed 1 July 2012.

[373] Resolution CM/ResDH(2009)127 (*Peers v Greece*), Adopted by the Committee of Ministers on 3 December 2009 at the 1072nd meeting of the Ministers' Deputies; and Resolution CM/ResDH(2009)128 (*Dougoz v Greece*), Adopted by the Committee of Ministers on 3 December 2009 at the 1072nd meeting of the Ministers' Deputies.

4.6 THE CASE-LAW ON PROVIDING SATISFACTORY HEALTHCARE IN DETENTION

The situation with the cases concerning healthcare in prisons is quite similar to the one described in the first part of the chapter on unsatisfactory detention conditions. Of course, an individual approach must be taken to cases concerning issues and violations of Article 3 rights that affect one particular individual and do not apply to prison healthcare in general. However, in cases where the issue is mainly concerning the general conditions of medical services in prisons, that are most of the time interconnected with the detention conditions in general, again I think the CPT experts are capable of dealing with the issue better than the Court together with the CoM.

As with the general detention conditions, the Court has very much relied on the CPT reports when dealing with applications concerning healthcare in prisons.[374] At the same time, the principles governing the healthcare in prisons in terms of the Convention share much in common with the standards introduced by the CPT. Although the Convention does not guarantee the right to healthcare or the right to prisoners' healthcare, the Court (and formerly the Commission) have introduced certain standards through their jurisprudence. Even more importantly, since the CPT has included this section in its documents the Court started to rely on its standards on a regular basis.[375] According to the Court's (and formerly the Commission's) standards, prison authorities are under a positive obligation to protect the health of persons deprived of their liberty, and the lack of appropriate medical care may amount to treatment contrary to Article 3.[376] Also, delay of providing medical help may constitute a violation of Article 3.[377] However, the practical impact of this kind of opinion used to be limited. In *Kudla v Poland* the applicant claimed that he has not been given adequate psychiatric treatment despite a report indicating that his continued imprisonment posed the likelihood that he would attempt suicide. The Court did not find a violation of Article 3 since it concluded that the applicant received frequent psychiatric assistance.[378] On the other hand, the Court stated: "…(U)nder this provision the State must ensure that a person is detained in conditions which are compatible with respect for his human dignity…and that, given

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374 See CPT standards of the healthcare in prisons in section 4.8.
375 3rd General Report on the CPT Activities (1992) CPT/Inf (93) 12 (includes a section on Health care in prisons).
376 *Hurtado v Switzerland* Series A no. 280- A (Opinion of the Commission) [79].
377 *Ilhan v Turkey* (2002) 34 E.H.R.R. 36 [86]-[87].
378 *Kudla v Poland* (2002) 35 E.H.R.R. 11 [96]-[100].

the practical demands of imprisonment, his health and well-being are adequately secured by, among other things, providing him with the requisite medical assistance..."[379] Securing health and well-being has become one of the Court's principles when deciding about a violation of Article 3 regarding healthcare in prisons and nowadays the state's responsibility to ensure the health and well-being of all the prisoners is being considered with much greater care than it was in the past.[380]

In *Melnik v Ukraine* the Court emphasized three particular elements to be considered in relation to the compatibility of the applicant's health with his stay in detention: "(a) the medical condition of the prisoner, (b) the adequacy of the medical assistance and care provided in detention and (c) the advisability of maintaining the detention measure in view of the state of health of the applicant."[381] In *Yakovenko v Ukraine* the applicant complained that he had not received adequate medical assistance for his HIV and tuberculosis. The Court stated: "In the Court's view, the failure to provide timely and appropriate medical assistance to the applicant in respect of his HIV and tuberculosis infections amounted to inhuman and degrading treatment within the meaning of Article 3 of the Convention".[382] In both *Yakovenko* and *Melnik* cases the Court, when considering the conditions of detention as well as the healthcare issues and when finding a violation of Article 3, very much relied on the CPT's reports on their visit to Ukraine. Several other Ukrainian cases concern conditions of detention together with the provision of medical care (for example, cases *Nevmerzhitsky v Ukraine*[383] and *Koval v Ukraine*[384]).

A case where the issue was the provision of special care to prisoners with special needs is *McGlinchey v United Kingdom.* In *McGlinchey* the applicants complained their mother had suffered inhuman and degrading treatment prior to her death in prison. She was suffering from severe withdrawal symptoms when she was first imprisoned. There was known to be a discrepancy in the weighing scales used on admission and those used in the health centre and consequently, the prison doctor relied on his clinical impressions rather than on the applicant's mother apparent weight loss in assessing her condition. Over several days Mrs McGlinchey suffered from uncontrolled vomiting symptoms and

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379 Ibid [94].
380 *Alver v Estonia* (n 319)*; Khokhlich v Ukraine* (n 320).
381 *Melnik v Ukraine* App no 72286/01 (ECtHR, 28 March 2006) [94].
382 *Yakovenko v Ukraine* (n 123) [90]-[102].
383 *Nevmerzhitsky v Ukraine* (2006) 43 E.H.R.R. 32.
384 *Koval v Ukraine* (2009) 48 E.H.R.R. 5.

was unable to eat or hold down fluids. Evidence showed that her consequent weight loss could have been as high as 10 kilograms. During the weekends, the prison doctor was not present although a locum doctor visited the prison on a Saturday morning. The nursing staff was expected to call out a doctor or arrange a transfer to a hospital if so required over the rest of the weekend period. Although her condition continued to deteriorate during the weekend, she was not visited by the locum doctor and the nursing staff did not call out a doctor or arrange for a hospital transfer during the remainder of the weekend. On the Monday morning Mrs McGlinchey collapsed and was transferred to hospital where she later died. The Court held, upholding the complaint, that a failure of authorities to provide Mrs McGlinchey with appropriate medication for her heroin withdrawal symptoms, preventing her from suffering or a worsening of her condition, the gap in the monitoring of her condition by a doctor together with a failure to take more effective steps to treat her condition, contravened the prohibition against inhuman or degrading treatment contained in Article 3.[385] The Court treated heroin addiction as a special vulnerability which increases a state's obligations under Article 3.

Although the *McGlinchey* case seems very much like individual rather than systemic failure (unlike the detention conditions cases), at the execution stage it is treated as an instance of systemic failure. The execution stage of other cases discussed here treats lack of medical care as an aspect of poor prison conditions; however, it can be separated from the previous detention conditions cases since it focuses on healthcare and not only the accommodation and accommodation related issues.

4.7. EXECUTION OF THE JUDGMENTS CONCERNING HEALTHCARE IN DETENTION

To date the CoM has adopted a final resolution in the *McGlinchey* case. In its 2007 Report on the Supervision of the execution of judgments of the European Court of Human Rights the CoM concluded regarding the *McGlinchey* case (Judgment final on 29/07/2003, Final resolution (2007)133):[386]

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[385] *McGlinchey v United Kingdom* (2003) 37 E.H.R.R. 41 [47]-[58].
[386] Resolution CM/ResDH(2007)133, Adopted by the Committee of Ministers on 31 October 2007 at the 1007th meeting of the Ministers' Deputies.

"General measures: Inhuman and degrading treatment: a programme, completed in 2006, was set up to improve prison health policy in relation to the handling of substance abusers and addicts. These developments were accompanied by a £40m increase in resources. This figure was expected to increase to £60m in 2007 with funding continuing thereafter. The purpose of this funding was to enhance clinical and psychological management of drug dependence in prisons to meet national and international standards of good practice. It is also to be noted that at the beginning of 2005 there were drug rehabilitation programmes in 103 establishments. In 2004/2005 an innovative, short-duration drug treatment programme, which can be carried out in around 4 months, was also introduced at 32 establishments, aimed at "short-term" prisoners. Data have shown a significant increase of prisoners who now benefit from these health services. Finally, research has demonstrated that drug treatment delivered in prison is effective in helping offenders stay drug-free and in reducing levels of re-offending."[387]

The execution of this judgement did not concern any individual measures beyond the payment of just satisfaction, it concerned mainly general measures intended to prevent similar violations. And those general measures were successfully executed because of both state willingness and the availability of financial resources. Even after the general measures had been complied with and the final resolution had been adopted by the CoM, there remains a lot of work and financial expenses for the state to take in order to have all the detention conditions satisfactory. This is visible from the CPT's report from 2008, since the work of CPT is continuous and so far it has visited places of detention in the UK and Northern Ireland thirteen times. In its visit (carried out from 18/11/2008-1/12/2009) the CPT pointed out all the problems in the UK detention system, such as the overcrowding, lack of activities for prisoners, need for the prisoners to be fully medically screened upon their arrival, staff training, and numerous others.[388] The UK Government provided the CPT with its report from which its willingness to co-operate with the CPT and the continuous progress of its detention system can be seen.[389]

The *McGlinchey* case might seem more 'individualistic' than other detention conditions cases that have been discussed. However, even this case, in its execution stage, required significant measures to be made by the UK, in order for it to prevent similar violations and new applications to the Court. It took several years for those measures to be introduced and for the situations in UK prisons to be in conformity with the Article 3

[387] Committee of Ministers, Supervision of the execution of judgements of the European Court of Human Rights 1st Annual Report 2007 (CoE March 2008), 53-54.
[388] Report to the Government of the United Kingdom on the visit to the United Kingdom carried out by the CPT from 18 November 2008 to 1 December 2008 CPT/Inf (2009) 30.
[389] Ibid.

standards. Most importantly, the CoM again relied on the work of the CPT and particularly regarding the situation in the future where it expressed its belief that the efforts by the UK authorities to improve the conditions of treatment of prisoners will continue.

Cases like *McGlinchey* are a minority since most of the 'new' CoE states do not have financial resources comparable to the UK. Also, the situation where the detention conditions and the medical services in prisons are in non-conformity with Article 3 of the Convention occur more rarely in the United Kingdom than in numerous other 'new' CoE states.

Unlike the situation in the UK, there are numerous cases and judgments against 'new' CoE states concerning the availability of medical services in connection with the detention conditions that are still not executed, mainly because of the state's lack of financial resources. In the *Nevmerzhitskiy* group of cases[390] the CoM in its last report on the execution of judgements pointed out that it follows from the Court's judgments and the reports of the CPT referred to in these judgments that the problems arising from the material conditions of detention and the lack of proper medical treatment in all three types of deprivation of liberty are of a structural nature and require comprehensive measures.[391] The CoM furthermore "recalled that the first judgment examined in these groups of cases was delivered by the Court in 2005; invited the Ukrainian authorities to provide urgently a comprehensive action plan aimed at responding to the structural problems highlighted by the Court in respect of conditions of detention and medical care, as well as aimed at setting up effective remedies in respect thereof; noted that this action plan should also address the other problems identified in the judgments of the Court; invited further the Ukrainian authorities to provide also their assessment on the impact of the measures adopted so far and the results achieved by these measures; noted further that information is also awaited on the outstanding individual measures."[392]

When it comes to the big problem of transmittable diseases in prisons, this issue has also been dealt both by the Court and the CoM on one side and the CPT on the other.

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[390] *Nevmerzhitsky v Ukraine* (n 383); *Dvoynykh v Ukraine* App no 72277/01(ECtHR, 12 October 2006); *Koval v Ukraine* (n 384) and three others.
[391] Current state of execution, *Nevmerzhitsky v Ukraine* (lead), <http://www.coe.int/t/dghl/monitoring/execution/Reports/pendingCases_en.asp?CaseTitleOrNumber=&StateCode=UKR&SectionCode=> accessed 1 July 2012.
[392] Ibid.

For this issue we shall look at a Croatian group of cases[393] where the Court found violations of Article 3 in all the cases regarding poor prison conditions and/or the medical treatment of detainees.

"The Croatian authorities renovated or constructed a number of prison facilities and increased their capacity in order to improve the conditions of detention in prisons, including in Lepoglava and Požega. They also took a number of measures aimed at improving medical treatment of prisoners, such as diagnosing prisoners infected with hepatitis and HIV or providing targeted therapies and medical counselling to prisoners infected with hepatitis. Information is awaited, however, on measures taken to improve the conditions of detentions in Lepoglava Prison and in Gospic Prison, in particular in Unit 2. The most recent CPT report on Croatia (CPT/Inf(2008)29) also noted the outstanding issues concerning the overcrowding and medical care in Lepoglava Prison and conditions of detention in Gospic Prison, in particular in Unit 2."[394]

As we can see, the CoM itself mentioned the CPT and its conclusions and recommendations as an important factor in assessing the scope of measures adopted by the Croatian Government. During its visit, the CPT visited most of the Croatian detention facilities and made a detailed report on which the Croatian Government gave a progress report a year after the visit.[395] Therefore, the issue of healthcare is very much interconnected to the issue of providing satisfactory detention conditions, and both of these issues are now being examined under the aegis of Article 3 of the Convention.

Based on the discussion so far, we might with definite certainty say that that Court has been reading more and more into the Article 3 rights. It does not require only from a state to refrain from treating people under its jurisdiction in a way that will represent torture, inhuman or degrading treatment but it has placed numerous positive obligations upon the state. Some of these obligations are to have satisfactory detention conditions as well as the medical care of a certain standard. In a large way, the work of the CPT has contributed in creating those standards. As stated, the question is what is the practical value of delivering judgements on poor prison conditions when it comes to the execution of judgements? Another question that can be asked is has the Court compromised the importance of Article 3 by delivering judgements based only on poor

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393 *Cenbauer v Croatia* (2007) 44 E.H.R.R. 49; *Pilčić v Croatia* App no 33138/06 (ECtHR, 17 January 2008); *Stitić v Croatia* App no 29660/03 (ECtHR, 08 November 2007); *Testa v Croatia* (2008) 47 E.H.R.R. 29.

394 Current state of execution*, Cenbauer v Croatia*, <http://www.coe.int/t/dghl/monitoring/execution/Reports/pendingCases_en.asp?CaseTitleOrNumber=&StateCode=CRO&SectionCode=> accessed 1 July 2012.

395Report to the Croatian Government on the visit to Croatia carried out by the CPT from 4 to 14 May 2007, CPT/Inf (2008) 29; and Response of the Croatian Government to the Report of the CPT on its visit to Croatia from 4 to 14 May 2007 CPT/Inf (2008) 30.

detention conditions which cannot be executed within the short period of time and for which there is no effective way of forcing states to comply with them immediately?

In a paper on Article 3 of the ECHR and proportionality S. Palmer wrote: "The consequences flowing from the finding of a negative or positive obligation should not be different. If State responsibility is engaged, it is irrelevant whether it is through a positive or negative obligation."[396] In my opinion that is indeed relevant when it comes to Article 3 and here arises the substantial difference among positive obligations with significant socio-economic elements, and negative obligations: the ability of the state to abide by the judgement and the possibility of it to do so within a reasonable time frame. I am not trying to say that there generally should be a division on positive and negative obligations as such, since in order to effectively protect human rights there must be an existence of both negative and positive obligations. What I want to ask is whether it is really necessary to read so many positive obligations with socio-economic elements into Article 3, obligations to have detention conditions and healthcare of certain standard, to be precise. No one can say that this kind of progress in the human rights area is not to be welcomed; however, it might be also said that it compromises the importance of Article 3. This is not because providing acceptable detention conditions and healthcare in prisons is something less important than protection from being actively subjected to ill-treatment. It is because even when the state is willing to comply with the judgement and execute it, most of the time introducing measures in order to comply with those judgements will be a long and extremely expensive process. Standards regarding detention conditions and healthcare in prisons are necessary, but are they necessary in the context of Article 3 which consists of absolute rights and protects the most fundamental human rights values? They can be very well protected through other mechanisms such as the CPT, as will be argued below.

[396] Stephanie Palmer, 'Wrong Turning: Article 3 ECHR and the Proportionality' (2006) 65(2) C.L.J. 358, 452.

4.8 THE CPT ON THE RIGHT TO HAVE SATISFACTORY DETENTION CONDITIONS AND ON THE RIGHT TO HEALTHCARE IN PRISONS

The CPT has given a lot of attention to the issue of detention conditions and healthcare in prisons. Some of the standards that the CPT has developed are on living accommodation and basic needs;[397] staffing selection, training and management;[398] provision of an adequate regime of activities;[399] and provision of healthcare in prisons.[400]

Regarding living accommodation and basic needs the CPT stated:

"Police cells should be clean, of a reasonable size for the number of people they are used to accommodate, and have adequate lighting (i.e. sufficient to read by, sleeping periods excluded) and ventilation; preferably, cells should enjoy natural light. Further, cells should be equipped with a means of rest (for example, a chair or bench) and persons obliged to stay overnight in custody should be provided with a clean mattress and clean blankets.

Persons in custody should be allowed to comply with the needs of nature when necessary, in clean and decent conditions, and be offered adequate washing facilities. They should have ready access to drinking water and be given food at appropriate times, including at least one full meal (i.e. something more substantial than a sandwich) every day. Those detained for extended periods (twenty-four hours or more) should, where possible, be allowed to take outdoor exercise."[401]

Furthermore, in its 2nd, 7th and 11th General Reports the CPT paid particular attention to the problem of prison overcrowding.[402]

In its 3rd General Report the CPT included a section on Health care services in prisons.[403] For the CPT "prisoners are entitled to the same level of medical care as persons living in the community at large"[404] and "an inadequate level of healthcare can lead rapidly to situations falling within the scope of the term inhuman and degrading treatment."[405] Subsequent country reports also have referred to particular aspects of

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397 Report to the Polish Government on the visit to Poland carried out by the CPT from 30 June to 20 July 1996 CPT/Inf (98) 13, [70]; 2nd General Report on the CPT Activities (1991) CPT/Inf (92) 3, [49]-[50].
398 2nd General Report on the CPT Activities (n 397), [59]-[60]
399 Ibid [47]-[48].
400 3rd General Report on the CPT Activities (n 373), [30]-[77].
401 CPT Report to the Polish Government (n 397), [25].
402 2nd General Report (n 397) [46]; 7th General Report on the CPT Activities (1996) CPT/Inf (97) 10, [12]-[15]; and 11th General Report on the The CPT Activities (2000) CPT /Inf (2001) 16, [28]-[30].
403 3rd General Report on the CPT Activities (n 375), [30]-[77].
404 Ibid [31].
405 Ibid [30].

healthcare.[406] Further on, in its 3rd General Report the CPT has emphasized numerous healthcare provisions that must be respected by the state. For example, newly arrived prisoners should be interviewed and examined by a medical doctor and they should be entitled to medical examination upon request.[407] As regards emergency care, there should always be a competent first aider and a doctor available on call.[408] Also, equivalence of care covers not only general health provision (appropriate medical, nursing, pharmacy and technical staff) but also psychiatric care services.[409] Mentally-ill prisoners should be kept and cared for in adequately-equipped and staffed hospital facility.[410] In respect of suicide prevention, the prison's healthcare should ensure both general awareness of this issue as well as the implementation of appropriate procedures.[411] Furthermore, healthcare should be directed not only at treatment but also at prevention of disease or ill-health. Special attention should be given to particular categories of detainees, like pregnant mothers, adolescents, or prisoners with personality disorders or who otherwise are unsuited for continued detention on account of age or severe disability.[412]

Transmittable diseases were given special attention in the 11th General Report. Here the CPT pointed out its awareness of the economic difficulties states might be facing; however, it stated:

"…Regardless of the difficulties faced at any given time, the act of depriving a person of his liberty always entails a duty of care which calls for effective methods of prevention, screening, and treatment. Compliance with this duty by public authorities is all the more important when it is a question of care required to treat life-threatening diseases."[413]

As we can see, the CPT has developed numerous standards on detention conditions and healthcare in prisons that it employs during its visits to the states and states in its reports. The question is now, could the detention conditions be dealt exclusively through the work of the CPT?

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406 Report to the Finnish Government on the visit to Finland carried out by the CPT from 10 to 20 May 1992, CPT/Inf (93) 8, [37]; Report to the Government of the United Kingdom on the visit to the United Kingdom carried out by the CPT from 14 to 19 March 2004, CPT/Inf (2005) 10 [98].
407 3rd General Report on the CPT Activities (n 375), [33].
408 Ibid [35].
409 Murdoch (n 319), 224.
410 3rd General Report on the CPT Activities (n 375), [43].
411 Ibid [57].
412 Ibid [64]-[70].
413 11th General Report on the CPT Activities (n 402), [31].

4.9 COULD THE DETENTION CONDITIONS BE DEALT WITH EXCLUSIVELY THROUGH THE WORK OF THE CPT?

In January 2012 the Court delivered a pilot judgment concerning detention conditions in Russia, *Ananayev and Others v Russia*.[414] The Court, when deciding whether a violation of Article 3 occurred, again relied heavily on the CPT's Reports, namely on its 2nd, 7th and 11th General Reports.[415] It found a violation of Article 3 and went on to say that it noted that inadequate conditions of detention appeared to constitute a recurrent problem in Russia which has led it to finding violations of Articles 3 and 13 of the Convention in more than eighty judgments that have been adopted since the first such finding in the *Kalashnikov* case in 2002.[416] It also emphasized another important aim of the pilot-judgment procedure, to induce the respondent State to resolve large numbers of individual cases arising from the same structural problem at the domestic level, thus implementing the principle of subsidiarity.

The Court, as a follow-up to this pilot judgment, decided not to adjourn the examination of similar applications pending before it. However, if the respondent State fails to adopt such measures following a pilot judgment and continues to violate the Convention, the Court will resume examination of all similar applications pending before it and proceed to judgment so as to ensure effective observance of the Convention.

Delivering pilot judgments in cases concerning detention conditions shows the Court's awareness of the systemic problem, and it might be a good step towards minimising the number of applications concerning poor detention conditions. Nevertheless, the CoM will need to supervise the execution of this and similar judgments and if the respondent state fails to adopt measures following a pilot judgment and continues to violate the Convention, the Court will resume examination of all similar applications pending before it. Therefore, delivering a pilot judgment might reduce the Court's workload but there is still a lot of work left for the CoM in supervising the judgment.

I argue that the issue of general detention conditions should be left to the CPT to deal with. As we have seen, most of the judgments concerning detention conditions are very

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414 *Ananayev and Others v Russia* App nos 42525/07 and 60800/08 (ECtHR, 10 January 2012).
415 Ibid [56]-[57].
416 Ibid [179].

much influenced by the CPT reports on its visits to states. Through its political pressure the CPT can and does prompt states into making positive steps regarding their detention conditions. It has proven so far to be the most effective body in monitoring detention facilities and in co-operating with states regarding these conditions. Also, the CPT is the only body within the CoE that deals exclusively with places of detention. Large parts of the Court's judgments regarding detention conditions (both when finding a violation and when deciding that no violation of Article 3 occurred) and the CoM reports on monitoring the execution of judgments are based on the CPT reports. The biggest 'disadvantage' of protecting the rights only by the CPT is that it is not a judicial body that has the authority to deliver binding judgements. However, despite this objectively big difference in mechanisms of enforcement, if we take a closer look at the sanctions for non-compliance with the Court's judgements or non-compliance with the reports and recommendations of the CPT we can notice that in all of these situations the sanctions are only of a political character. They do not (and cannot) have the characteristics like that national systems do, since this is a regional arena when states are always on one side of the dispute and only monetary compensation or suspension of the state's membership (or some other type of political sanctions) can be introduced. However, the CoE bodies are very reluctant when it comes to suspending a country from its rights of representation.[417]

There is a difference between the 'detention conditions' cases and the situations that might raise the issue of suspension from the CoE. The fact is that in most of the 'detention conditions' cases states show their willingness to execute the judgements, but the process is progressive and very long and requires great financial expense. Also, the CoE bodies are very reluctant when it comes to suspending a state from CoE membership so it is not likely that the Parliamentary Assembly will call upon the CoM to suspend a state for non-compliance with the detention conditions judgment. As is the case with most situations of non-compliance with the judgements, the only means available to the CoM is to pressure the states to speed up their improvement of the detention conditions through interim resolutions. Interim resolutions may be adopted with various objectives: to urge the domestic authorities to conclude on-going reforms; to express concern about the negligence and/or delay in execution and urge further

[417] See Section 3.4.

action; or to provide indications as to the execution measures expected.[418] However, these interim measures represent only political pressure to states urging them to speed up the execution of judgments.

Now, let us look at the CPT working methods and why I think that the unacceptable detention conditions might also be dealt through the CPT's work. The CPT visits places of detention to see how persons deprived of their liberty are treated and, if necessary, to recommend improvements to states. Unlike the CoM, the CPT will not only monitor the situation in the place of detention which is the concern of a particular judgement, but it will visit all places that it appointed in its annual visiting programme (periodic visits) and it may also organise additional *ad hoc* visits if necessary. States are obliged to co-operate with the CPT and allow its members access to all places of detention. When a state refuses to co-operate the sanction available to the CPT is the power to make a public statement on a state's continuing failure to take steps to address CPT concerns. Only six such public statements have been made to this date; two of them were in respect of Turkey, three were concerning the Chechen Republic of the Russian Federation and the last one was concerning Greece.[419] These public statements are intended to put political pressure on the states and to force them to cooperate with the CPT. The CPT's public statements have a lot in common with the CoM interim resolutions. Public statements consist of the CPT's concerns regarding the situation with ill-treatment of prisoners or their detention conditions; its call for dialogue with the state and co-operation; and of facts found during its visit. Only the third type of interim resolutions is not available to the CPT; however, this type of resolution is used only exceptionally and from a sanction point of view they are not different from other interim resolutions. Therefore, we can see that both under the ECPT and under the Convention the only means available in order to urge states into improving their detention conditions is political pressure.

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418 Steering Committee for Human Rights (CDDH), Suggestions on solutions in the event of slowness in the execution of judgment, DH-PR (2005)001 (26 April 2005) [26].

419 3rd General Report on the CPT Activities (n 375), appendix. 4: *Public statement concerning on Turkey*; The CPT, Public statement on Turkey issued on 6 December 1996, CPT/Inf (96) 34; 12th General Report on the CPT Activities (2001) CPT/Inf (2002) 15, appendix. 6: *Public statement concerning the Chechen Republic of the Russian Federation*; 13th General Report on the CPT Activities (2002-2003) CPT/Inf (2003) 35, appendix. 7: *Public statement concerning the Chechen Republic of the Russian* Federation; 17th General Report on the CPT Activities (2006-2007) CPT/Inf (2007) 39, appendix 9: *Public statement concerning the Chechen Republic of the Russian Federation*; and 21st General Report on the CPT Activities (2010-2011) CPT/Inf (2011) 28, appendix 8: *Public statement concerning Greece*.

As already mentioned, the CPT has developed a set of standards and these standards are promulgated in its annual/general reports and in country reports.[420] The annual general reports describe the CPT's work during the past year and may also contain some substantive issues and general standards, and individual country reports arising out of CPT's programme of visits. Up to July 2012, the CPT had carried out 323 visits (195 periodic visits + 128 ad hoc visits) and 271 CPT reports were published.[421] It is not likely that the Court would deliver as many judgements as it did on Article 3 violations based solely on prison conditions if it was not for the CPT and its work which also shows us its importance in the detention conditions context.

4.10 CONCLUSION

To conclude, one way to deal with unacceptable detention conditions might be through the CPT's work which would allow the Court to deal with more serious and individualistic cases of Article 3 violations and the CoM to focus on the execution of judgements that objectively can be executed immediately or at least within a reasonable time frame. Furthermore, the CPT delegates regularly visit places of detention and after the visit they expect the state to continuously inform them on the improvements made. Therefore, it does not seem as if there would be increase (at least not significant) in the CPT workload. Giving the CPT exclusive jurisdiction over detention conditions issues, as was the case prior to 2001, would also help to reduce the Court's and the CoM's workload without endangering the Article 3 protection. From all that has been written above, one can see that judgments concerning detention conditions and healthcare in prisons have significant socio-economic elements when it comes to their execution. They place large financial burdens on states and it takes years for states to bring detention centres in conformity with required standards. Also, they usually concern the whole, or a large proportion, of a prison population thereby being more collective than individual in their nature. The fact that many other people are similarly affected does not by itself diminish the fact of a violation in relation to the individual. If a large prison population is being subjected to ill-treatment in breach of Article 3, the number of people affected does not mean that the Court should not deal with the issue. However,

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[420] The CPT Report to the Polish Government (n 396), [70]; 2nd General Report on the CPT Activities (n 396) [47]-[50], [59] and [60]; 3rd General Report on the CPT Activities (n 375) [30]-[77].
[421] About the CPT <http://www.cpt.coe.int/en/about.htm> accessed 1 August 2012.

when it comes to the detention conditions and healthcare in prisons, this is an issue not originally guaranteed under Article 3 and it can effectively be protected by a non-judicial body, while the same cannot be said for other cases concerning Article 3 violations. As stated, whether the Court finds a violation or the CPT delivers a report concerning detention conditions, the reaction of the state can only be progressive implementation of the necessary measures. Despite the moral and symbolic effect of the Court finding a violation of rights, rather than just the CPT noting the need for improvement, the fact is that if there is no response from the state regarding the Court's judgment or if the response to it and its execution is very slow, this actually undermines the importance of the Court's judgments and threatens to diminish the relevance of the Court's judgments concerning rights of individuals.

Numerous applications, especially from 'new' CoE states are coming before the Court, a lot of them regarding the same detention centres. Although the Court has started delivering pilot judgments, there is still a substantial amount of work left for the CoM in supervising the execution of these judgments. Furthermore, if the respondent state fails to adopt measures following a pilot judgment, the Court will resume examination of all similar applications pending before it and again deal with the same issue.

On the other side, the CPT co-operates with the states very successfully and states have shown great willingness in improving their detention conditions in order for them to comply with the CPT standards. General measures required from states by the CoM are mostly based on the CPT reports and I do not see how the protection of prisoners would be compromised if the CoE bodies cede the management of detention conditions to the CPT. One way of doing that is if the Court, upon receiving an application concerning general detention conditions, makes a practice statement that it is an issue for the CPT to deal with it and forwards the application to the CPT. Of course, the CPT would not examine the application in the same manner as the Court but receiving such an application should urge it to conduct an *ad hoc* visit to a detention centre in question and issue a report on the visit consisting of measures necessary to improve detention conditions. Regarding applications that also concern claims of violation of Article 3 of one particular individual (not only of unsatisfactory detention conditions), the Court should deliver a judgment but when finding a violation it should point out that only supervision of individual measures should be left for the CoM while

leaving the supervision of the general measures necessary to the CPT again urging it to pay particular attention to the detention centre concerned.

CHAPTER V

THE RIGHT TO A HEALTHY ENVIRONMENT

5.1 INTRODUCTION

The ECHR does not contain a guaranteed right to a healthy environment, nor does the ESC. However, through the Courts' jurisprudence and the ESCR decisions and reports many aspects of the right to a healthy environment are now very much included in the CoE system for the protection of human rights. Some scholars consider the right to a healthy environment as a third generation right.[422] Nevertheless, it is now implicitly included in the ESC (as will be discussed here) and explicitly in the Inter-American Protocol on Social, Economic and Cultural Rights (San Salvador Protocol- Article 11) as well as in the AfCHPR (Article 24). Thus, it is generally treated as a second-generation right. According to A. Boyle environmental rights do not fit into any category of human rights and they can be seen from at least three different perspectives, straddling all the various categories of human rights.[423] It is not my intention here to question whether the right to a healthy environment is a second or a third generation right (or even a first generation right). My intention is to look at the existing machineries for human rights protection in Europe and to propose a solution for the effective protection of the right to a healthy environment. What can be seen from the global and regional practice is that environmental rights are considered to be more appropriate for protection under the

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[422] Stephen P. Marks, 'Emerging Human Rights: A New Generation for the 1980s?' (1980-1981) 33 Rutgers L. Rev. 435; Jennifer A. Downs, 'Healthy and Ecologically Balanced Environment: An Argument for a Third Generation Right' (1992-1993) 3 Duke J. Comp. & Int'l L. 352; Sumudu Atapattu, 'Right to a Healthy Life or the Right to Die Polluted: The Emergence of a Human Right to a Healthy Environment under International Law' (2002-2003) 16 Tul. Envtl. L.J. 65.

[423] Alan Boyle, 'Human Rights and the Environment: A Reassessment' (2007) XVIII Fordham Environmental Law Review 471, 471. On the right to the healthy environment and the Convention *see also* Ole W. Pedersen, 'The Ties that Bind: the Environment, the European Convention on Human Rights and the Rule of Law' (2010) 16(4) European Public Law 571; N.A. Morenham, 'The Right to Respect for a Private Life in the European Convention on Human Rights: a Re-examination' (2008) 1 E.H.R.L.R. 44; Loukis G. Loucaides, *The European Convention on Human Rights: Collected Essays* (Martinus Nijhoff Publishers 2007) Chapter 10 "Environment Protection through the Jurisprudence of the European Convention on Human Rights; Margaret DeMerieux, 'Deriving Environmental Rights from the European Convention for the Protection of Human Rights and Fundamental Freedoms' (2001) 21(3) Oxford Journal of Legal Studies 521; *Manual on Human Rights and the Environment, Principles Emerging from the case-law of the European Convention on Human Rights* (CoE Publishing 2006); and Daniel Garcia San Jose, *Environmental Protection and the European Convention on Human Right* (CoE Publishing 2005).

economic and social instruments and are nowadays included in the mainstream of human rights.

Within the Convention system, alleged violations of the right to a healthy environment have been considered by the Court under Articles 2 and 8. Both Article 2 and Article 8 of the Convention consist of two paragraphs. In the first paragraph the rights are expressed and in the second paragraph permissible interferences with those rights are elaborated. Article 8 places the obligations on states to respect a wide range of personal interests. Generally, there are four main interests protected: private life, family life, home and correspondence and all of those interests have 'autonomous' meaning. In its application of Article 8, the Court has taken a flexible approach to the definition of the individual interests protected, with the result that the provision continues to broaden in scope. What will be one of the interests for this chapter is the inclusion of the right to a healthy environment under Article 8. The cases where the Court has been willing to require the protection of persons from serious environmental pollution under the aegis of Article 8 will be examined. Furthermore, when dangerous and hazardous activities have had detrimental effects on the health of the applicant or resulted in death, they resulted in claims for violation of Article 2 of the Convention. Those cases will also be elaborated upon in this chapter.

After discussing the most relevant case-law regarding violations of Articles 8 and 2 due to the environmental pollution, the current state of the execution of judgments concerning that case-law will be presented. What will be argued is that, as with the detention conditions cases, the execution of general measures required from states in environmental cases is a long and financially demanding process. My question here will be whether it is really necessary, or I might even say wise, to consider the issue of the right to a healthy environment under the Convention. In relation to that question, the discussion that was had within the CoE in relation to making an Additional Protocol to the Convention on the Right to a Healthy Environment will be presented. This question was raised both in 2003 and 2009 and on both occasions the opinion of the Committee on Legal Affairs and Human Rights (CLAHR) of the Parliamentary Assembly was that it did not believe that extending the Convention through the proposed additional protocol was the correct solution.

After presenting that discussion, I will look at the ESC system. Both in the Collective Complaints and in the Reporting system the ECSR has read a right to a healthy environment into the right to health in Article 11 of the Charter. Sections 5.8-5.10. look at this development. The reason for doing so is to show that nowadays, considering all the problems which the Convention system is facing (particularly the extensive caseload, the long time it takes to produce a judgment and even longer time it takes to enforce it), this is one of the issues that might be better dealt with through the ESC system of Collective Complaints and through the Reporting system for those states that have not (yet) accepted the system of Collective Complaints. In my opinion, the right to a healthy environment is still too vague and has too many socio-economic elements to be guaranteed under the Convention, despite the non-absolute nature of Articles 2 and 8. Moreover, I see no reason why this right should not be secured through the ESC without lessening in any way its relevance.

5.2 ARTICLE 8 OF THE ECHR AND THE RIGHT TO A HEALTHY ENVIRONMENT

Article 8 states:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

In its application of Article 8, the Court, taking the judicial activist approach to the Convention, has taken a flexible approach to the definition of the individual interests protected, with the result that the provision continues to broaden in scope in line with social and technical developments. Issues falling within Article 8 now include even search and seizure, secret surveillance, immigration law, paternity and identity rights, child and family law, assisted reproduction, suicide, prisoners' rights, inheritance, tenants' rights, and environmental protection.[424] What will be of the interest for this

[424] Harris, O'Boyle and Warbrick (n 25), 361.

thesis is environmental protection. The Court has made it clear that there are positive obligations inherent in Article 8(1), including both those requiring states to take steps to provide rights or privileges for individuals and those which require states to protect persons against the activities of other private individuals which prevent the effective enjoyment of their rights.[425] In most of the cases regarding Article 8, its application requires a two-stage test. In the first stage comes the question of whether the complaint falls within the scope of Article 8(1). If it does, the second stage entails an examination of whether the state's interference is consistent with the requirements of Article 8 (2).

The determination whether or not a positive obligation exists under Article 8 cannot be precisely defined. The Court has stated: "In determining whether or not a positive obligation exists, regard must be had to the fair balance that has to be struck between the general interest of the community and the interests of the individual, the search for which balance is inherent in the whole of the Convention."[426] In *Johnston and Others v Ireland* it concluded: "…Especially as far as those positive obligations are concerned, the notion of 'respect' is not clear-cut: having regard to the diversity of the practices followed and the situations obtaining in the contracting states, the notion's requirement will vary considerably from case to case. Accordingly, this is an area in which the Contracting Parties enjoy a wide margin of appreciation in determining the steps to be taken to ensure compliance with the Convention with due regard to the needs and resources of the community and of the individuals."[427]

The Court has held that a state's positive obligations include an obligation to take action to deal with severe environmental pollution affecting an applicant's home. Environmental degradation does not necessarily involve a violation of Article 8, but will do if the adverse effects attain a certain minimum level. As with the Article 3 violations, the assessment of that minimum will depend on all the circumstances of the case, such as the intensity and duration of the nuisance and its physical and mental effects, as well as on the general environmental context.[428] The Court has even found a state in breach for its failure to notify affected residents of the risks associated with the operation of a fertiliser plant, emitting toxic substances and inflammable gases.[429]

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[425] Ibid, 362. *X and Y v Netherlands* (n 121).
[426] *Rees v United Kingdom* (1987) 9 E.H.R.R. 56.
[427] *Johnston and Others v Ireland* (n 190), [55].
[428] *Manual on Human Rights and the Environment* (n 423), 14.
[429] *Guerra and Others v Italy* (1998) 26 E.H.R.R. 357.

The *Guerra* judgment indicated that states may be found in breach of their positive obligations under Article 8 if they fail to provide crucial safety and environmental information to local residents facing serious risks of severe pollution. Later, in *McGinley and Egan v United Kingdom* the Court held that: "…(w)here a Government engages in hazardous activities, such as those in issue in the present case, which might have hidden adverse consequences on the health of those involved in such activities, respect for private and family life under Article 8 requires that an effective and accessible procedure be established which enables such persons to seek all relevant and appropriate information."[430]

These cases consider the issue of providing information on dangerous activities to the people that may be affected. What will be looked at now are cases where the Court examined the issue of protecting persons from serious environmental pollution under the aegis of Article 8. As stated by one of the most eminent experts in the area of the European system for human rights protection: "That type of protection can involve considerable public expenditure and may be characterised as a newer generation right that the civil and political rights underpinning most of the Convention's substantive guarantees."[431]

One of the first environmental cases, *Powell and Rayner v United Kingdom*,[432] was regarding noise pollution, where the applicants claimed that noise from Heathrow Airport gave rise to a violation of Article 8. The Court agreed with the applicants that the "scope for enjoying the amenities of his home have been adversely affected' and that Article 8 is a 'material provision'."[433] It concluded, however, that in the light of the public need for the airport and the efforts that had been made to limit the noise, no violation of Article 8 had been made out. The first applicant lived under a flight departure route several miles from Heathrow airport, whilst the second applicant lived directly under flight paths just over one mile from the airport's northern runway. The Court held that Article 8 applied to both applicants as the quality of their private lives and their ability to enjoy the amenities of their homes had been adversely affected, to different degrees, by noise from aircraft using Heathrow. This airport had been privatised in 1986; therefore the

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[430] *McGinley and Egan v United Kingdom* (1999) 27 E.H.R.R. 1 [101].
[431] Mowbray, *The Development of Positive Obligations*… (n 23), 149-150.
[432] *Powell and Rayner v United Kingdom* (1990) 12 E.H.R.R. 355.
[433] Ibid [40].

government submitted that their only obligations under Article 8 in regard to the applicants' homes were positive ones. In the Court's opinion:

"Whether the present case be analysed in terms of a positive duty on the State to take reasonable and appropriate measures to secure the applicants' rights under paragraph 1 of Article 8 or in terms of an 'interference by a public authority' to be justified in accordance with paragraph 2, the applicable principles are broadly similar. In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole; and in both contexts the State enjoys a certain margin of appreciation in determining the steps to be taken to ensure compliance with the Convention. Furthermore, even in relation to the positive obligations flowing from the first paragraph of Article 8, 'in striking [the required] balance the aims mentioned in the second paragraph may be of certain relevance."[434]

The Court noted the uncontested data produced by the government demonstrating the economic importance of Heathrow and that many measures, including restriction on night flights, aircraft noise monitoring, a £19 million scheme for the sound insolation of 16,000 homes and the purchase of homes very close to the runways, had been undertaken to reduce the noise pollution from Heathrow. Consequently, the Court determined that "there is no serious ground for maintaining that either the policy approach to the problem or the content of the particular regulatory measures adopted by the United Kingdom authorities gives rise to violation of Article 8, whether under its positive or negative head."[435] Strictly speaking, this case was not decided under Article 8, but under Article 13, which involved the Court having to determine whether the applicants had an arguable case under Article 8. However, it is important to consider it in the context of including the right to a healthy environment under the aegis of Article 8.

Another significant environmental case concerning Heathrow airport is *Hatton and Others v United Kingdom*.[436] Here, unlike in *Powell and Rayner* the Chamber majority found the regime governing night flights from Heathrow to be in breach of Article 8. The applicants complained that the Government's policy on night flights at Heathrow airport in London violated their rights under Article 8. The Chamber, by five votes to two, distinguished the current case from the earlier Heathrow case by reference to the different factual circumstances, since the present action was concerned with night flights

[434] Ibid [41].
[435] Ibid [42].
[436] *Hatton and Others v United Kingdom* (n 204).

under the post 1993 regime. The majority held that mere reference to the economic well-being of the country is not sufficient to outweigh the rights of others. It considered that states are required to minimise, as far as possible, the interference with these rights, by trying to find alternative solutions and by generally seeking to achieve their aims in the least onerous way as regards human rights. In order to do that, a proper and complete investigation and study with the aim of finding the best possible solution which will, in reality, strike the right balance should precede the relevant project.[437]

Judge Greve in her partly dissenting opinion stated that she did not believe there had been a breach of Article 8. She believed that the majority had impermissibly narrowed the margin of appreciation accorded to states in environmental matters by the established case-law and gave the following interesting statement:

"In modern society, environmental problems are not discreet and only of concern to those who may invoke Article 8, given their proximity to the source of the given problem. One of the functions of planning is, to the extent possible, to protect people against the negative impact on the environment of, for instance, and as *in casu*, the transport infrastructure; another function is to ensure that no group of people is disproportionately affected by what is considered necessary to meet the needs of modern urban society. The amount and complexity of the factual information needed to strike a fair balance in these respects is more often than not of such a nature that the European Court will be at a marked disadvantage compared to the national authorities in terms of acquiring the necessary level of understanding for appropriate decision-making. Moreover, environmental rights represent a new generation of human rights. How the balance is to be struck will therefore affect the rights not only of those close enough to the source of the environmental problem to invoke Article 8, but also the rights of those members of the wider public affected by the problem and who must be considered to have a stake in the balancing exercise. Furthermore, the general principle concerning the assessment of facts argues in favour of a wide margin of appreciation in these cases."[438]

This case was later referred to the Grand Chamber which found no violation of the same Article. It explained that in cases involving state decisions affecting environmental issues there are two aspects to the Court's inquiry: the first is to assess the substantive merits of the government's decision to ensure that it is compatible with Article 8 and the second is to scrutinize the decision-making process to ensure that due weight has been accorded to the interest of the individual.[439] Significantly, with respect to the former, the Grand Chamber avoided identifying which approach to the application of

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[437] Ibid [97].
[438] Ibid, Partly dissenting opinion of Judge Greve.
[439] *Hatton and Others v United Kingdom* (GC judgment) (n 204), [128].

Article 8 was applicable in this case viewing the central issue as simply whether a fair balance has been struck down between the relevant interests. It remarked that economic interests were specifically enumerated as a legitimate aim under Article 8(2) and that accordingly it was appropriate for the state to take them into account in policy-making.[440] It suggested that the essential question is the breadth of the state's margin of appreciation.[441] The Grand Chamber did not find that the authorities overstepped their margin of appreciation by failing to strike a fair balance between the right of the individuals affected by those regulations to respect for their private life and home and the conflicting interests of others and of the community as a whole, nor did it find that there have been fundamental procedural flaws in the preparation of the 1993 regulations on limitations for night flights. Therefore, it found no violation of Article 8.

However, five judges issued a joint dissenting opinion which advocated a stronger role for the Court in responding to complaints concerning environmental pollution.[442] They stated that while it is true that the original text of the Convention does not disclose an awareness of the need for the protection of environmental human rights, in the 1950s the universal need for environmental protection was not yet apparent.[443] They also emphasized that the Grand Chamber's judgment in the present case, in so far as it concludes, contrary to the Chamber's judgment of 2 October 2001, that there was no violation of Article 8, seems to deviate from the developments in the case-law and even takes a step backwards. According to them, it gives precedence to economic considerations over basic health conditions in qualifying the applicants' sensitivity to noise as that of a small minority of people.[444] The dissenters considered that in the context of constant disturbance of persons sleep at night by aircraft noise there was a positive obligation upon States to ensure as far as possible that ordinary people enjoy normal sleeping conditions.[445] Consequently, the margin of appreciation of the state is narrowed because of the fundamental nature of the right to sleep, which may be outweighed only by the real, pressing (if not urgent) needs of the state.[446]

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[440] Ibid [121].
[441] Ibid [100]-[103] and [122].
[442] Ibid, joint dissenting opinions of Judges Costa, Ress, Turmen, Zupancic and Steiner.
[443] Ibid [1].
[444] Ibid [5].
[445] Ibid [12].
[446] Ibid [17].

In *Hatton* the judges were not unanimous in their approach regarding the protection of the right to a healthy environment under Article 8 of the Convention. The Chamber found that there has been a violation thereby narrowing the state's margin of appreciation whereas the Grand Chamber found that economic interests prevailed over the applicant's right not to be subjected to noise from the airport. I would mostly agree with judge Greve and her dissenting opinion on the Chamber judgment, since the right to a healthy environment is not a right that is appropriate for protection under the Convention, due to the fact that environmental problems are not discreet and only of concern to those who may invoke Article 8, given their proximity to the source of the given problem.[447]

The first case where an environmental complaint was upheld was in 1994 in *Lopez Ostra v Spain*.[448] The applicant complained that the fumes and noise from a waste treatment plant situated near her home made her family's living conditions unbearable. After having had to bear the nuisance caused by the plant for more than three years, the family moved when it became clear that the nuisance could go on indefinitely and when the applicants' daughter's paediatrician recommended them that they do so. While recognising that the noise and smells had a negative effect on the applicant's quality of life, the national authorities argued that they did not constitute a grave health risk and that they did not reach a level of severity whereby the applicant's fundamental rights were breached. The Court balanced the 'town's economic well-being' against the applicant's interest in home and private and family life when deciding whether there had been a breach of Article 8. Whilst the plant was necessary for the economic well-being of the town and its leather industry, the judges were united in concluding that a fair balance had not been struck by the authorities in seeking to protect the applicant from the effects of severe pollution. The Court found that severe environmental pollution may affect individuals' well-being and prevent them from enjoying their homes in such a way as to affect adversely their private and family life, even though it does not seriously endanger their health. In this case, the Court found a violation of Article 8. This decision gave an indication that it will not be sufficient for states to simply create pollution control regimes, rather they must also take adequate steps to enforce those rules.

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[447] *Hatton and Others v United Kingdom* (n 204), partly dissenting opinion of Judge Greve.
[448] *Lopez Ostra v Spain* (n 81).

Are we talking here of the negative or the positive obligation on the part of the state? Again, the Court has not made this clear but it stated that in both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole, and in any case the state enjoys a certain margin of appreciation.[449]

A similar case where the Court also found a violation of Article 8 due to noise that interfered with the applicants Article 8 rights is *Moreno Gomez v Spain*.[450] The applicant complained that persistent noise coming from nightclubs near her home disturbed her sleep for a long time. The Court reiterated what it said in *Lopez Ostra*[451]and found that the applicant suffered a serious infringement of her right to respect for her home as a result of the authorities' failure to take action to deal with the night-time disturbances.[452] It is interesting to notice that in this case the Court reiterated that the Convention is "intended to guarantee rights that are ""practical and effective", not "theoretical or illusory.""[453]

Another relevant case regarding healthy environment in the context of industrial pollution is *Fadeyeva v Russia.*[454] Here, the applicant lived in the vicinity of a steel plant, an important steel producing centre in the respondent State. From 1982 the applicant and her family were living less than 500 metres from the large steel plant. In order to limit the impact of pollution from the plant, a 5,000 metre wide 'sanitary security zone' existed. The zone was supposed to separate the plant from residential areas although, in practice, several thousand people, including the applicant and her family, lived in the zone. In 1996 the Government noted that the plant was responsible for 96 per cent of all emissions in the area and that the overlap between industrial and residential areas was plainly harmful to health. The pollution was found to be responsible for the huge increase in the number of children with respiratory and skin diseases and the increased number of adult cancer deaths. The Court observed that in order to fall under Article 8, complaints relating to environmental nuisances have to show that there has been an actual interference with the individual's "private sphere" and that these nuisances have reached a certain level of severity. In the case in question, the Court found that over a

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449 Ibid [51].
450 (n 230).
451 Ibid [55].
452 Ibid [61].
453 Ibid [56].
454 *Fadeyeva v Russia* (2007) 45 E.H.R.R. 10.

significant period of time the concentration of various toxic elements in the air near the applicant's house seriously exceeded safe levels and that the applicant's health had deteriorated as a result of the prolonged exposure to the industrial emissions from the steel plant. Therefore, the Court accepted that the actual detriment to the applicant's health and well-being reached a level sufficient to bring it within the scope of Article 8. Finally, it concluded that there had been a violation of Article 8.

Furthermore, in *Giacomelli v Italy*[455] the applicant had lived since 1950 in a house in the outskirts of Brescia, 30 metres away from a plant for storage and treatment of 'special waste'. An operating licence for the plant had been granted for the storage and treatment of hazardous and non-hazardous waste. The regional council subsequently authorised the treatment of harmful and toxic industrial waste by a detoxification process involving significant risks to the environment and human health. The applicant brought judicial review proceedings, and the national court held that the renewal of the operating licence had been unlawful and ordered the suspension of operations pending an environmental impact assessment which the regional council had previously ordered. The assessment was carried out and revealed that the operation of the plant was incompatible with environmental regulations, but would be allowed to continue provided that it complied with requirements laid down by the regional council. The respondent Government submitted that the interference with the applicants' right to respect for her home was justified as being in accordance with the law and in pursuit of the legitimate aims of protecting the public health and preserving the region's economic well-being. The Court upheld the applicants' complaint and found a violation of Article 8 of the Convention. It stated that the respondent Government had not succeeded in striking a fair balance between the interest of the community in having a plant for the treatment of toxic industrial waste and the applicant's effective enjoyment of her right to respect for her home and her private and family life. Also, neither the decision to grant the plant an operating licence for the plant, nor the decision to authorise it to treat industrial waste by means of detoxification, had been preceded by an appropriate investigation or study.

One of the most recent cases concerning hazardous industrial processes and their impact on the local population is *Tatar v Romania.*[456] In this particular case the applicants

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[455] *Giacomelli v Italy* (2007) 45 E.H.R.R. 38.
[456] *Tatar v Romania* App no 67021/01 (ECtHR, 27 January 2009).

lived in Baia Mare. The company S.C. Aurul S.A., obtained in 1998 a licence to exploit the Baia Mare gold mine. The company's extraction process involved the use of sodium cyanide and part of its activity was located in the vicinity of the applicants' home. On 30 January 2000 an environmental accident occurred at the site. A UN study reported that a dam had breached, releasing about 100,000 m3 of cyanide-contaminated tailings water into the environment. The report stated that S.C. Aurul S.A. had not halted its operations. The applicants complained under Article 2 that the activities carried out by the company put their lives in danger, and that the authorities had failed to take any action. In its admissibility decision of July 2007 the Court ruled that the applicants' complaints should be examined under Article 8. When it comes to the medical condition of the first applicant the Court noted that the applicant had failed to prove the existence of a causal link between exposure to sodium cyanide and asthma. Nevertheless, despite the lack of a causal link, the existence of a serious and material risk for the applicants' health and well-being entailed a duty on the part of the State, under Article 8, to assess the risks, both at the time it granted the operating permit and subsequent to the accident, and to take the appropriate measures. The Court noted that even after the accident from January 2000 the company was allowed to continue its industrial operations, in breach of the precautionary principle, according to which the absence of certainty with regard to current scientific and technical knowledge could not justify any delay on the part of the state in adopting effective and proportionate measures. The Court also stressed the authorities' duty to inform the public and guarantee the right of its members to participate in the decision-making process concerning environmental issues.[457] Finally, the Court concluded that the Romanian authorities had failed in their duty to assess the risks entailed by the activity, and had failed to take suitable measures to protect the applicants' rights under Article 8 and more generally their right to a healthy environment.[458]

All these judgments demonstrate the Court's willingness to accept that complaints concerning environmental pollution can be brought within the ambit of Article 8. Furthermore, states could be liable if they failed to take adequate measures, such as through enacting and enforcing appropriate regulatory regimes or ameliorating the effects of significant forms of pollution caused by private sector business that affected persons' enjoyment of their homes. Acknowledging the necessity of many possible

[457] Ibid [115]-[118].
[458] Ibid [122]-[125].

sources of pollution in modern developed societies, the Court also accorded states a margin of appreciation in their task of balancing the conflicting interests of society as a whole and the needs of residents near unavoidable sources of pollution.[459] Where decisions of public authorities affect the environment to the extent that there is an interference with the right to respect for private and family life or the home, they must accord with the conditions set out in Article 8 (2),[460] meaning that such decisions must be provided for by law, follow a legitimate aim and must be proportionate to the legitimate aim pursued. As already mentioned, this basically means that a fair balance must be struck between the individual and the interests of a community as a whole. Therefore, in certain situations, interference by public authorities may be acceptable under the Convention- but it has to be justified. These cases also show that on certain occasions protecting civil rights, such as the right to private and family life, and to respect for the home, enters the sphere of socio-economic protection, such as protection of the right to a healthy environment. The socio-economic elements of the rights to a healthy environment are particularly visible when it comes to the execution of judgments concerning this right.

5.3 EXECUTION OF THE ARTICLE 8 'ENVIRONMENTAL JUDGMENTS'

As with all the Court's judgements, the CoM is the body responsible for monitoring the execution of judgements. First, the execution of *Lopez Ostra v Spain* and *Moreno Gomez v Spain* will be looked at. In both of those cases the CoM adopted Final Resolutions. In *Lopez Ostra* the CoM adopted a Resolution a year after the Court delivered a judgment[461] stating that the Government of Spain paid the applicant the sum provided for in the judgment and therefore it has exercised its functions under Article 54 of the Convention in this case. Therefore, in this case only individual measures were necessary. In *Moreno Gomez v Spain* the Resolution was adopted in 2008, almost four years after the Court delivered its judgment.[462] The CoM took note of the individual measures taken by Spain but also of general measures preventing similar violations. It found that both Spanish

[459] Mowbray, *The Development of Positive Obligations*… (n 23), 182-183.
[460] *Manual on Human Rights and the Environment* (n 423), 14.
[461] Resolution DH(95)252 Adopted by the Committee of Ministers on 20 November 1995 at the 549th meeting of the Ministers' Deputies.
[462] Resolution CM/ResDH(2008)57 Adopted by the Committee of Ministers on 25 June 2008 at the 1028th meeting of the Ministers' Deputies.

national and regional legislation now provide protection against noise pollution and that Spanish courts have been very active in this field and therefore decided to close the examination of the case.

Now, the latest CoM report on the execution of judgments of the last three cases described here, the most recent ones, viewed in June 2012 will be presented. In *Tatar v Romania* the authorities provided information on the execution of this judgment on 5 March 2010. Bilateral contracts are underway to secure the additional information necessary to present an action plan/action report to the CoM.[463]

In *Giacomelli v Italy*, in relation to the individual measures, information is awaited on the implementation of the environmental requirements of the Decree of the Ministry of the Environment of 2004, which were issued five years after the judgment. As to the general measures, the CoM is awaiting the confirmation of dissemination of the judgment to the Ministry of the Environment authorities so that they may take the Court's findings into account and be aware of their obligations under the Convention.[464]

When it comes to the *Fadeyeva* case, the CoM report points out that all information provided by authorities so far regarding the execution of the judgment, as well as the outstanding issues are summarised in the Memorandum CM/Inf/DH(2007)7.[465] The CoM report on the execution of judgments concerns not only *Fadeyeva* case but also *Ledyayeva, Dobrokhotova, Zolotareva* and *Romashina* cases.[466] The Memorandum has been prepared to assist the CoM in its supervision of the judgement in the case *Fadeyeva* and is being updated on the basis of the information provided by the applicants.[467]

"The memorandum sums up the information provided by the Russian authorities to the Committee of Ministers and notes the positive environmental dynamic around Severstal plant since the facts at issue in the judgment. It further points out a number of outstanding issues arising in the light of the Court's findings. These issues concern in particular:

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463 Current state of execution, *Tatar v Romania,* <http://www.coe.int/t/dghl/monitoring/execution/Reports/pendingCases_en.asp?CaseTitleOrNumber=Tatar&StateCode=ROM&SectionCode=> accessed 11 July 2012.
464 Current state of execution, *Giacomelli v Italy*, <http://www.coe.int/t/dghl/monitoring/execution/Reports/pendingCases_en.asp?CaseTitleOrNumber=Giacomelli&StateCode=ITA&SectionCode=> accessed 11 July 2012.
465 Ministers' Deputies Information documents CM/Inf/DH(2007)7 13 February 2007, Industrial pollution in breach of the European Convention: Measures required by a European Court judgment.
466 App nos 53157/99; 53247/99, 56850/00 and 53695/00 (ECtHR, 16 October 2006).
467 Ibid.

- the general legislative and regulatory framework governing the decision-making process leading to the setting up of sanitary zones around polluting enterprises;
- the public scrutiny of this decision-making process and domestic remedies available to the population;
- close supervision of polluting enterprises' compliance with the domestic environmental rules and the action to be taken to ensure compliance."[468]

The information is provided by the authorities regarding the measures they are taking to improve the situation. However, regarding all the information provided by the Russian authorities, the CoM Secretariat in its assessment wrote: "The statistics provided by the Russian authorities are encouraging as they show a positive general dynamic as regards the decrease of the level of air pollution in the region. However, it remains to be demonstrated whether the level of air pollution all along the new border of the sanitary zone is below the MPLs provided for by Russian legislation."[469] As to the long-term programmes to improve the situation, the Secretariat pointed out that the authorities indicated in the framework of the proceedings before the Court that the new deadline for bringing the plant's emissions below the dangerous level is now 2015. The Court considered that the overall improvement of the environmental situation would appear to be very slow and that the authorities failed to show clearly what their policy was in order to accelerate the compliance of the plant with the standards. The authorities have mentioned in their action plan certain environmental programmes under way without specifying what kind of measures have been taken by the local authorities or by the plant itself. Therefore, the CoM requested more details about these programmes.[470]

As with the Article 3 detention conditions, most cases concerning violations of the right to a healthy environment concern not only the applicants, but also the population that might be (or is) affected. Also, the judgments concerning the right to a healthy environment cannot be executed immediately but they require an action plan from the states and furthermore, enforcement of that action plan. This is mostly visible from the *Fadeyeva* case where the CoM prepared a Memorandum consisting of the required measures. The Russian authorities have shown that they have taken certain measures to improve the situation regarding the industrial pollution together with the resettlement of the applicants in an ecologically safe area. However, despite the applicants' resettlement and the measures taken the situation is still not satisfactory. It will take years for the

[468] Memorandum CM/Inf/DH(2007)7 (n 465).
[469] Ibid [53].
[470] Ibid [55] and [56].

situation in the area to be in conformity with the healthy environment requirements, which is in connection with the great financial expenditure needed by the Russian government. This all shows the significant socio-economic elements inherent in execution of the healthy environment judgments and the challenges for both the CoM, when supervising the execution of judgments, and for states, when trying to bring the situation in conformity with the healthy environment requirements.

In the following section the environmental cases decided under aegis of Article 2 of the Convention will be discussed.

5.4 'ENVIRONMENTAL CASES' DECIDED UNDER ARTICLE 2 OF THE CONVENTION

When it comes to Article 2 and environmental issues the Court has not considered them in as many cases as it did under Article 8. Furthermore, Article 2 is likely to be applicable only in the case of environmental disasters where there is loss of life, and more routine instances of violations of a claimed right to a healthy environment will fall under Article 8. However, judgments decided under Article 2 are also worth mentioning and analysing here, since again the execution of these judgments requires numerous general measures. Although Article 2 is primarily of a negative character, since its purpose is to prevent the state from deliberately taking life, as with all the other Convention articles, it was impossible to keep this right absolutely negative in its nature, since the living instrument and the dynamic and evolutive interpretation doctrines have stimulated the development of positive obligations for the state.

It was the *L.C.B.* case[471] where the Court recognized for the first time that obligations from Article 2 require the State not only to refrain from the intentional or unlawful taking of life, but also to take all the appropriate steps to safeguard lives of those within their jurisdiction.[472] Here, the applicant's father had been exposed to radiation whilst serving in the armed forces on Christmas Island in 1957 and 1958 when a number of nuclear tests were carried out by the UK. The applicant was born in 1966 and in 1970 she was diagnosed as having leukaemia which she attributed to her father's exposure to

[471] *L.C.B. v United Kingdom* (1999) 27 E.H.R.R 212.
[472] White and Ovey (n 27), 152.

radiation. In 1993 she applied to the Commission, which referred her case to the Court. She contended that the UK's failure to warn her father of the possible risks to health and its failure to monitor the dose of radiation which he received amounted to breaches of the Convention's Articles 2 and 3. The Court considered that the UK would only have been required to act on its own motion to advise her parents and monitor her health if it had appeared likely that exposure of her father to radiation might have caused a real risk to her health. In the instant case, the Court considered that the applicant had not established a causal link between the exposure of her father to radiation and her leukaemia. Therefore, the UK's failure to take any measures regarding the risk to L.C.B.'s health between 1966 and the date of diagnosis in 1970 did not constitute a breach of Articles 2 or 3. Nevertheless, it was the first case where environmental hazards and issues had been raised before of the Court.

The next significant and much more complex case concerning environmental issues was *Oneryildiz v Turkey*.[473] This case was considered before the Chamber and before the Grand Chamber and here only the Grand Chamber's decision will be presented. The applicant complained that the failure of the Turkish authorities to take appropriate steps to prevent the accidental death of nine of his relatives and the destruction of his property breached Articles 2 and 13 of the Convention and Article 1 of Protocol 1. The applicant had lived with his family in a slum bordering on a municipal refuse tip. A methane explosion at the tip caused a landslide which engulfed his house, killing thirty nine people, of whom nine were his relatives. Responsibility was attributed to a number of public authorities. The applicant commenced administrative proceedings against the authorities responsible for the tip and claimed compensation for the loss of his relatives and destruction of his possessions. In its assessment of the case the Court found a direct causal link between the accident and the contributory negligence of the authorities. As to the possible violation of Article 2, the applicant argued that the death of his relatives and the flaws in the ensuing proceedings violated the Article 2 right to life. The Grand Chamber found a violation of the substantive aspect of Article 2. In its assessment of the general principles applicable in this case the judges stated that the positive obligation to take all appropriate steps to safeguard life for the purposes of Article 2 entails above all a primary duty on the state to put in place a legislative and administrative framework designed to provide effective deterrence against threats to the

[473] *Onerylidiz v Turkey* (2005) 41 E.H.R.R. 20.

right to life.[474] Although this has previously been applied in the context of law enforcement, the significance of the *Öneryıldız* judgment is that the judges stated that this also applies in the context of dangerous activities. The judges said that regulation of such activities should make it compulsory for all those concerned to take practical measures to protect people whose lives might be endangered by the inherent risks. That obligation had to be construed as applying in the context of any activity, whether public or not, where the right to life might be at stake, and *a fortiori* in the case of industrial activities which by their very nature were dangerous'.[475] Information had been available to the authorities to the effect that inhabitants of the slum were in danger on account of the shortcomings of the tip. However the authorities failed to take the necessary measures to protect those inhabitants.

Furthermore, where lives have been lost in circumstances potentially engaging the responsibility of the state, that provision entails a duty for the state to ensure, by all means at its disposal, an adequate response, judicial or otherwise. This response by the state includes the duty promptly to initiate an investigation. In the *Öneryıldız v Turkey*, where lives had been lost, the Grand Chamber held that the authorities should of their own motion launch investigations into the accident which led to these deaths. Therefore, the Grand Chamber found both violations of substantive and procedural aspects of Article 2 showing that a state can and will be responsible for the loss of lives caused by dangerous industrial activities.

The next relevant case in terms of right to a healthy and safe environment that was examined under Article 2 is *Budayeva and Others v Russia*[476] where the Court extended the state's positive obligation even to situations involving natural disasters. Here the Court had directly addressed questions concerning recourse to the Convention in circumstances of allegedly ineffective regulatory performance on the part of the state. The applicants lived in an area which over several decades had suffered from regular, annual mudslides, and these culminated (in 2000) in a week-long series of mudslide events. Consequences included eight deaths, numerous serious injuries, and other health effects, together with the destruction of homes and other property. Although the authorities had responded by providing replacement housing and lump-sum emergency

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474 Ibid [89].
475 Ibid [70].
476 *Budayeva and Others v Russia* App nos. 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02 (ECtHR, 20 March 2008).

allowances, the disaster appeared to be regarded officially as accidental, and no public investigation, criminal or otherwise, had been activated thereafter. Meanwhile, civil proceedings taken out against the authorities had been dismissed on the basis that local residents had been informed of the risk, and that all reasonable mitigating measures had been taken by the authorities. The applicants alleged violations of Articles 2, 8 and 13 of the Convention and of Article 1 of Protocol No. 1.

As to the alleged violation of Article 2, the applicants complained that the authorities had failed to comply with their positive obligations to take appropriate measures to mitigate the risks to their lives against the natural hazards. The first applicant complained that the domestic authorities were responsible for the death of her husband in the mudslide of July 2000. She and the other applicants also complained that the domestic authorities were responsible for putting their lives at risk, as they had failed to discharge the state's positive obligations and had been negligent in the maintenance of the dam, in monitoring the hazardous area and in providing an emergency warning or taking other reasonable measures to mitigate the risk and the effects of the natural disaster. The Court in its assessment reiterated that Article 2 lays down a positive obligation on states to take appropriate steps to safeguard the lives of those within their jurisdiction.[477] The Court applied the general principles mentioned in the *L.C.B.* and *Onedryildiz* cases to the alleged failure to maintain defence and warning infrastructures (a substantive aspect of Article 2) and to the judicial response required in the event of alleged infringements of the right to life (a procedural aspect of Article 2). As to the substantive aspect, the Court concluded that there was no justification for the authorities' omissions in implementing the land-planning and emergency relief policies in the hazardous area given the foreseeable exposure of residents, including all applicants, to mortal risk. It found that there was a causal link between the serious administrative flaws that impeded their implementation and the death of Mr Budayev and the injuries sustained by the first and the second applicants and the members of their family. The authorities had thus failed to discharge the positive obligation to establish a legislative and administrative framework designed to provide effective deterrence against threats to the right to life as required by Article 2. Accordingly, the Court found a violation of Article 2 in its substantive aspect.[478] As to the procedural aspect, having found that the question of state responsibility for the accident in Tyrnauz

[477] Ibid [128].
[478] Ibid [158]-[160].

had never as such been investigated or examined by any judicial or administrative authority, the Court concluded that there has also been a violation of Article 2 in its procedural aspect.[479]

It is clear from *Budayeva* that factors crucial to determining whether interference with Convention rights is justified will encompass circumstances such as anticipated levels of risk, past events, and imminence and seriousness of future threats.

5.5 EXECUTION OF ARTICLE 2 'ENVIRONMENTAL JUDGMENTS'

Let us now take a look at the execution of the *Onedryildiz* and *Budayeva* cases where the Court found a violation of Article 2 caused by the environmental related hazards and accidents.

In the *Onedryildiz* case the damage caused by the violations including the unpaid sums awarded by domestic courts has been covered by the just satisfaction awarded by the Court. However, of the interest here again are the general measures. The CoM noted that the Turkish authorities submitted numerous pieces of information regarding a plan of action for the execution of this judgment. The Ümraniye tip has been covered with earth following a decision of the local council which also installed air ducts on it. Furthermore, a rehabilitation project has been put into force by the Istanbul Metropolitan Municipality, which has planted trees on the area of the former site of the tip and has had a sports ground laid down. The new Criminal Code has been brought into force and the strategic plan for solid waste management in Istanbul, guided by the environmental regulations of the European Union, was prepared and put into practice. However, despite all the measures, the judgment has still not executed in its entirety and the information from Turkish authorities is still awaited.[480]

In *Budayeva v Russia* regarding individual measures only just satisfaction for the non-pecuniary damage had to be paid. However, as for the general measures, the CoM reported:

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[479] Ibid [165].

[480] Current state of execution, *Onedryildiz v Turkey*, <http://www.coe.int/t/dghl/monitoring/execution/Reports/pendingCases_en.asp?CaseTitleOrNumber=48939%2F99&StateCode=TUR&SectionCode=> accessed 1 June 2012.

"*Information provided by the Russian authorities (1059th meeting, June 2009):* On 6/01/2006 the government of the Russian Federation adopted a Federal Programme aimed at lowering the risks and reducing the consequences of emergencies of natural and industrial origins covering the period until the end of 2010. To implement it, a regional programme for the Republic of Kabardino-Balkariya (RKB), was adopted by the Parliament of the RKB. The regional programme focuses not least on setting up an adequate legislative and administrative framework, improving monitoring and forecasting systems and developing the warning infrastructure.

• *This information is being assessed.*"[481]

The CoM decided to resume consideration of this item, in the light of information to be provided on general measures.

What can be concluded is that the *Onedryildiz* and *Budayeva* cases are particularly important for establishing the principle of positive obligations under Article 2 of the Convention and the protection of life, however from the perspective of protecting the right to a healthy environment their contribution is not of such significance. Furthermore, the governments are not keen on executing these judgments speedily, and as we will see they are reporting on the same issues to the ECSR through the Reporting and the Collective Complaints procedure. Therefore, it does not seem that these judgments will have any significance in terms of protecting the right to a healthy environment as such.

5.6 CONCLUSION ON ENVIRONMENTAL CASES DECIDED UNDER THE ECHR

We can draw certain conclusions from all these cases, both the ones that concern Article 8 and Article 2 violations regarding the environmental issues. First of all, "states have a positive duty to take appropriate measures to prevent industrial pollution or other forms of environmental nuisance from seriously interfering with health or the enjoyment of private life or property."[482] Its extent will depend on the harmfulness of the activity and the foreseeability of the risk. Secondly, although the Court refers to the need to balance the rights of the individual with the needs of the community as a whole, in some cases

[481] Current state of execution, *Budayeva and others v Russia*, <http://www.coe.int/t/dghl/monitoring/execution/Reports/pendingCases_en.asp?CaseTitleOrNumber=Budayeva&StateCode=RUS&SectionCode=> accessed 1 June 2012.
[482] Boyle, 'Human Rights and the Environment: A Reassessment' (n 423), 488.

the states' failure to apply or enforce their own environmental laws left no room for such a defence.[483] States cannot expect to persuade the Court that the needs of the community can best be met in such cases by not enforcing the law. Thirdly, the beneficiaries of this duty to regulate and control sources of environmental harm are not the community at large, still less the environment per se, but only those individuals whose rights will be affected by any failure to act. The duty is not one of protecting the environment, but of protecting humans from significantly harmful environmental impacts.[484]

Regarding the third point mentioned, in *Kyrtatos v Greece*[485] the Court used an opportunity to clarify the scope of Article 8 with regard to environmental issues. It noted first:

"Severe environmental pollution may affect individuals' well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely, without, however, seriously endangering their health. The crucial element in determining whether pollution has adversely affected one of the rights safeguarded by Art.8(1) is a harmful effect on a person's private or family sphere, not simply the general deterioration of the environment. Neither Art.8 nor any of the Convention's other Articles provide general protection of the environment."[486]

And secondly,

"Even if the environment has been severely damaged by urban development, the applicants have not shown that the alleged damage to the birds and other protected species living in the swamp directly affected their own rights under Art.8(1). It might have been otherwise if the environmental deterioration complained of had consisted in the destruction of a forest area in the vicinity of the applicants' house, a situation which could have affected their own well-being more directly. As it is, however, the interference with the conditions of animal life in the swamp does not constitute an attack on the applicants' private or family life."[487]

In this case the Court found no violation of Article 8, since the disturbances caused by the urban development of the area had not reached a sufficient degree of seriousness to be taken into account for the purposes of Article 8.

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[483] Ibid, 489.
[484] Ibid.
[485] *Kyrtatos v Greece* (2005) 40 E.H.R.R. 16.
[486] Ibid [52].
[487] Ibid [53].

Therefore, the application under the Convention can only be brought by the direct victims of the environmental hazards that can prove a causal link between their loss and the environmental disturbances. As we have seen, it cannot be always shown by the applicants there has been a causal link between their right to private life and environmental, and even more rarely with their right to life. What will also not be taken into account are potential violations of the Convention.[488] Finally, while cases are brought by individuals, in many of those cases hundreds or thousands of other people are affected by the same harmful activity. Therefore, even when the Court delivers a judgment finding a violation such a judgment will have wide-ranging socio-economic elements since usually there will be numerous other people affected by the same environmental hazard and it will take years for the state to bring the situation into conformity with the healthy environment standards.

The individual cases concerning environmental issues do not have much impact on the protection of the environment itself nor is the Convention system suitable for those issues. These judgments, particularly the ones where a violation of Article 8 has been found, only bring uncertainty regarding states obligations under the Convention and make the supervision of the execution extremely demanding and the point at which the judgment is actually enforced in its entirety uncertain.

The appearance of the 'environmental cases' raised the idea of making an additional protocol to the Convention on the right to healthy environment. The discussion on adopting an additional protocol to the Convention will now be analysed before turning to the healthy environment as protected under the ESC system. As will be seen, the ESC system, both the Reporting and the Collective Complaint system, are much more suitable for cases involving environmental hazards, since there is no victim requirement, potential violations are taken into account and by its character it is more suitable for non-individual complaints.

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[488] *Tauira and Eighteen Others v France,* App no 28204/95 (EComHR Decision, 4 December 1995). See also similar cases where the environmental claims were rejected due to the inability to satisfy the 'victim requirement': *Balmer- Schafroth v Switzerland* (1998) 25 E.H.R.R. 598; *Athanassoglou and Others v Switzerland* (2001) 31 E.H.R.R. 13.

5.7 DISCUSSION ON ADOPTING AN ADDITIONAL PROTOCOL TO THE EUROPEAN CONVENTION ON THE RIGHT TO A HEALTHY ENVIRONMENT

Because of new environmental cases that appeared before the Court, the Committee on the Environment, Agriculture and Local and Regional Affairs of the CoE's Parliamentary Assembly in 2009 recommended that the CoM should draw up an additional protocol to the Convention, recognising the right to a healthy and viable environment.[489]

However, already in June 2003, the Parliamentary Assembly's CLAHR had rejected the idea of an additional protocol on the right to a healthy environment as being unjustifiable and potentially counterproductive.[490] The new recommendation from 2009 made by the Committee on the Environment, Agriculture and Local and Regional Affairs afforded the CLAHR the opportunity to re-examine its position, and the justifications and viability of such a Protocol.

On 29 December 2009, the CLAHR published its opinion on the 'Preparation on an additional protocol to The European Convention on Human Rights, on the right to a healthy environment'. At the beginning of its opinion, the CLAHR stated that although it recognises the importance of the healthy, viable and decent environment, it does not believe that extending the Convention through the proposed additional protocol is the correct solution.[491]

In its explanatory memorandum the CLAHR considered the background history and existing case-law. It stressed that the Court had already identified in its case-law issues related to the environment which could affect the right to life (Article 2), the right to respect for private and family life as well as the home (Article 8), the right to a fair trial and access to a court (Article 6), the right to receive and impart information and ideas (Article 10), the right to an effective remedy (Article 13) and the right to the peaceful enjoyment of one's possessions (Article 1 of Protocol No. 1).[492] In answer to the question whetеher the environment is protected under the Convention it is stated that "The Convention is not designed to provide a general protection of the environment as

[489] Parliamentary Assembly, Doc. 12043, 29 September 2009 (n 19).
[490] Parliamentary Assembly, Doc. 9833, 19 June 2003 (n 19).
[491] Parliamentary Assembly, Doc. 12043, 29 September 2009 (n 19) [I].
[492] Ibid [12].

such and does not expressly guarantee a right to a sound, quiet and healthy environment. However, the Convention indirectly offers a certain degree of protection with regard to environmental matters as demonstrated by the evolving case law of the Court in this area."[493]

In the 2009 Opinion the CLAHR Rapporteur, Mr Chope, in his explanatory memorandum stated that to include a new protocol, which was so vague, would lead to uncertainty and be a recipe for a substantial increase in the Court's case load. Mr Erik Jurgens in 2003 had expressed similar concerns and had said:

"It must be remembered that, despite its enormous success in advancing the protection of a particular range of human rights in Europe, the Convention is not an instrument that is appropriate for all forms of rights. The Convention was intended to protect a narrow range of rights and its mechanisms designed specifically with those rights in mind; it is not structured for, nor capable of, the protection of all rights addressed by international instruments. Its past achievements are not a guarantee of limitless resilience: indeed, this very success can generate risks to its future integrity and to the capacity of the Court to work effectively in enforcing its provisions. These risks include the temptation to extend its jurisdiction to other forms of rights of uncertain content, scope and application. The inclusion of such 'untested rights' – which to a large extent could require primary elaboration not on national political and legal levels but through the case law of a pan- European judicial body – could not only undermine the standing of the Court but threaten it with an unmanageable burden of new applications (at a time when the level of applications is already a serious problem), to the detriment of protection of the rights currently included."[494]

In his opinion Mr Chope again quoted Mr Jurgens warning that "If we give citizens a broadly formulated, individual right to a healthy environment without being more specific as to the basis on which and against whom a citizen can in fact make a claim arising from that right, it becomes difficult for a judge to adjudicate."[495]

Mr Chope went on to emphasize that "introducing a right into the Convention that is impossible to enforce endangers the whole system."[496] In his concluding remarks before stating his belief that an additional protocol is not the correct solution, Mr Chope stated: "There is a significant difference between an environment that is healthy and one that merely supports life. In order for the Court not to be overwhelmed with ambitious and speculative applications, any additional protocol would need to clearly define which acts

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493 Ibid [13].
494 Parliamentary Assembly, Doc. 9833, 19 June 2003 (n 19) [9].
495 Parliamentary Assembly, Doc. 12043, 29 September 2009 (n 19) [17].
496 Ibid [41].

or omissions constitute a human rights violation. It must be remembered that not every environmental problem can be perceived as a potential human rights violation."[497]

As we can see from both the opinions in 2003 and 2009, the experts agreed that it would not be advisable to make an additional protocol to the Convention on the right to a healthy environment. As the main obstacle, the Rapporteurs in both opinions mentioned the vagueness and uncertainty of the right to a healthy environment and its broadness as well as the danger that a huge amount of new applications might come before the Court.

The Convention, despite being a living instrument, is intended to protect a narrow range of rights with mechanisms designed specifically with those rights in mind and it does not seem to be a good idea to include the right to a healthy environment under the Convention. However, the Convention is not the only human rights instrument in Europe. The following part of the chapter will be on the right to a healthy environment as interpreted by the ECSR under the ESC, and it will consider whether that would be a possible alternative to the Convention and Court as a means of guaranteeing a right to a healthy environment.

5.8 THE ESC AND THE RIGHT TO A HEALTHY ENVIRONMENT

Article 11 of the ESC guarantees the right to protection of health. The wording of Article 11 is the same under both versions of the Charter, with a difference in paragraph 3 of the Revised Charter where it urges states to take appropriate measures to prevent as far as possible epidemic, endemic and other diseases, as well as accidents, while the original version of the Charter does not refer to accidents. Taking account of the complementarity with the Convention and the growing link that State parties to the Charter and other international bodies now make between the protection of health and a healthy environment, the ECSR has interpreted Article 11 as including the right to a healthy environment.[498]

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[497] Ibid [43].
[498] *Marangopoulos Foundation for Human Rights (MFHR) v Greece* (n 103), [195].

In an information document on the right to health prepared by the secretariat of the ESC in March 2009 the ECSR emphasized, regarding the right to a healthy environment, that:

"The ECSR acknowledges that overcoming pollution is an objective that can only be achieved gradually. States must nevertheless take measures to achieve this goal within a reasonable time, with measurable progress and making maximum use of available resources. The measures taken are assessed with reference to their national legislation and regulations and undertakings entered into with regard to the European Union and the United Nations, and in terms of how the relevant law is applied in practice."[499]

Furthermore, under the heading 'air pollution', the ECSR pointed out:

"In order to guarantee a healthy environment, states must therefore:

– develop and regularly update sufficiently comprehensive legislation and regulations in the environmental field;

– take specific steps (such as modifying equipment, introducing threshold values for emissions, measuring air quality, etc.) to prevent air pollution at local level and to help reduce it on a global scale…;

– ensure that environmental standards and rules are properly applied, through appropriate supervisory machinery that is both effective and efficient, i.e. comprising measures which have been shown to be sufficiently dissuasive and have a direct effect on polluting emission levels;

– assess, systematically if necessary, health risks through epidemiological monitoring of the groups concerned."[500]

The right to a healthy environment is not something that can be achieved and realised immediately. The ECSR stressed the economic and social nature of the right to a healthy environment, regardless of its obvious importance for the society and its individuals. This information document is based on the ECSR decisions and conclusions as the ECSR has been scrutinizing the situation in Member States regarding environmental issues for years. Despite the fact that states have only to report every four years, states are- through the Reporting system- informing the ECSR on the relevant matters regarding the environment. One might suspect that by stating how overcoming pollution is an objective that can only be achieved gradually the ECSR will be tolerant and open handed in its conclusions and decisions to states when assessing

[499] The right to health and the European Social Charter, Information document prepared by the secretariat of the ESC (March 2009), 2.
[500] Ibid, 2-3.

the measures they introduced in order to secure the healthy environment. However, we will see from the collective complaint and reports that will be discussed that is not the case at all.

5.9 COLLECTIVE COMPLAINTS CONCERNING THE RIGHT TO A HEALTHY ENVIRONMENT

Unfortunately, the ECSR case-law on the right to a healthy environment is not numerous, to be exact only two collective complaints on that issue have been lodged so far and regarding one of them ECSR has adopted a decision on the merits.[501] Nevertheless, this one decision gives us a very valuable overview of the ECSR's standpoint on the issue of the right to a healthy environment.

The Marangopoulos Foundation for Human Rights lodged a complaint on 4 April 2005 in relation to Article 11 (right to protection of health), Article 2(4) (right to reduced working hours or additional holidays for workers in dangerous or unhealthy occupations), Article 3(1) (safety and health regulations at work) and Article 3(2) (provision for the enforcement of safety and health regulations by measures of supervision) of the ESC. In the complaint it was alleged that in the main areas where lignite is mined Greece had not adequately prevented the impact on the environment nor developed an appropriate strategy in order to prevent and respond to the health hazards for the population. It was also alleged that there is no legal framework guaranteeing the security and safety of persons working in lignite mines and that the later did not benefit from reduced working hours or additional holidays. Here, only on the complaint regarding Article 11 will be analysed.

Greece is the second largest lignite producer in the EU and fifth in the world. Since the Greek Government acknowledged the polluting effects of lignite production, the questions before the ECSR were whether the pollution was attributable to Greece and whether it led to a violation of the right to health (as well as of the right to just

[501] *Marangopoulos Foundation for Human Rights (MFHR) v Greece* (n 103) and *International Federation for Human Rights (FIDH) v Greece* (72/2011), decision on admissibility of 7 December 2011. (The later complaint concerns the effects of massive environmental pollution on the health of persons living near the Asopos river and in proximity to the industrial zone of Inofyta. The complainant organisation alleges that the State has not taken adequate measures to eliminate or reduce these dangerous effects and to ensure the right to health protection, in violation of Article 11 of the ESC).

conditions of work and the right to safe and healthy working conditions). The Government claimed that the mining operations were undertaken by private entities for whose actions the state could not be held accountable. In response to that argument the ECSR concluded that regardless of the company's legal status Greece was required to ensure compliance with its positive undertakings under the Charter. The ECSR's jurisdiction *ratione temporis* also had to be considered since the Protocol establishing the Collective Complaint procedure came into force in Greece in August 1998. The Greek Government maintained that acts or omissions prior to that date could not be taken into consideration. On this issue (which had already been considered in the decision on admissibility) the ECSR relied on the notion of a 'continuing violation' developed by the Court,[502] meaning that the Government will be held accountable for an event occurring before the entry into force of a treaty if it continues to produce effects after this. The ECSR found that there might be a breach of the duty of preventing damage arising from air pollution, for as long as the pollution continues. It also needs to be emphasized that, when deciding whether a violation of the Charter occurred the ECSR stressed that the ESC is a living instrument and that rights and freedoms set out in it are to be interpreted in the light of current conditions.[503]

The ECSR acknowledged that the use of lignite and its mining serve legitimate objectives under the Charter (such as energy independence, access to electricity at a reasonable cost, and economic growth), but nonetheless, it identified several areas in which the state's efforts fell short of Greece's national and international undertakings to overcome pollution, which, in turn, had resulted in a failure to protect the health of the population. It found that, although the Greek Constitution makes protection of the environment an obligation of the state and, at the same time, an individual right, national environmental protection legislation and regulations were not applied and enforced in an effective manner, and that the environmental inspectorates were not sufficiently equipped.[504] Based on these and other facts before it, the ECSR found no real evidence of Greece's commitment to improving the situation within a reasonable time.[505] The ECSR also concluded that, "even taking into consideration the margin of discretion granted to national authorities in such matters, Greece had not managed to strike a reasonable balance between the interests of persons living in the lignite mining

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[502] *Papamichalopoulos v Greece* (1993) 16 E.H.R.R. 440.
[503] *Marangopoulos Foundation for Human Rights (MFHR) v Greece* (n 103) [194].
[504] Ibid [208]-[216].
[505] Ibid [207].

areas and the general interest",[506] and thus that there had been a violation of Greece's obligations with respect to the right to protection of health under the Charter.

In her paper M. Trilisch wrote that *Marangopoulos v Greece* is, "undoubtedly, one of the most important decisions the ECSR has taken so far. Not only does it provide some much-needed input on the social right to health, it also clarifies the ECSR jurisdiction *ratione temporis* when dealing with positive obligations under the Charter. Most importantly, however, it places the right to a healthy environment in the mainstream of human rights."[507] Furthermore, she emphasized the impact this decision has on the material content of the right involved as well as on the removal of the right to a healthy environment from the constrained realm of so-called third generation rights. She mentioned one of the first cases examined by the Court (*Lopez Ostra v Spain)* emphasizing that "the Court did not expressly rely on the right to a healthy environment as such. Therefore, the Committee's decision can be understood as further advancing the progressive endorsement of environmental issues by the European human rights institutions."[508] This is something to be welcomed and encouraged. The ECSR has through this decision proven its willingness and ability to provide decisions on complex and demanding issues like environmental pollution.

In its Resolution on the case,[509] adopted on 16 January 2008, the CoM stated, regarding violation of Articles 11(1), 11(2) and 11(3) of the Charter:

"The Greek National Action Plan for 2005-2007 (NAP1) provides for greenhouse gas emissions for the whole country and all sectors combined to rise by no more than 39.2% until 2010, whereas Greece was committed, in the framework of the Kyoto Protocol, to an increase in these gases of no more than 25% in 2010. When air quality measurements reveal that emission limit values have been exceeded, the penalties imposed are limited and have little dissuasive effect. Moreover, the initiatives taken by DEH (the public power corporation operating the Greek lignite mines) to adapt plant and mining equipment to the "best available techniques" have been slow.

The Committee finds that Greek regulations satisfy all the requirements concerning information to the public about and their participation in the procedure for approving environmental criteria for projects and activities. However, the circumstances surrounding the granting and extension of several authorisations,

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506 Ibid [221].
507 Mirja Trilsch, 'European Committee of Social Rights: The Right to a Healthy Environment' (2009) 7(3) I.J.C.L. 529, 532.
508 Ibid [533].
509 Resolution CM/ResChS(2008)1 on the Collective Complaint No. 30/2005 by the Marangopoulos Foundation for Human Rights (MFHR) against Greece (Adopted by the Committee of Ministers on 16 January 2008 at the 1015th meeting of the Ministers' Deputies).

and the publication on the Internet of such a complex document as the NAP1 for just four days, show that in practice the Greek authorities do not apply the relevant legislation satisfactorily.

The Committee considers that the government does not provide sufficiently precise information to amount to a valid education policy aimed at persons living in lignite mining areas. Finally, very little has so far been done to organise systematic epidemiological monitoring of those concerned and no morbidity studies have been carried out."[510]

Unfortunately, not only did it take two years for the CoM to adopt a Resolution but it seems rather mild only stating that it welcomes the measures already taken by the Greek authorities as well as further measures envisaged in order to ensure the effective implementation of the rights protected by the ESC. However, as will be seen, the ECRS is also through the Reporting procedure continuously supervising the situation in Greece concerning the environmental problems arising out of lignite mining.

5.10 THE REPORTING SYSTEM UNDER THE ESC CONCERNING THE RIGHT TO A HEALTHY ENVIRONMENT

There is an ongoing dialogue between states that send reports and the ECSR that adopts conclusions on those reports. Unlike the collective complaints where there are only two complaints concerning the right to a healthy environment, there are numerous reports and conclusions regarding Article 11(3) of the both the Original and the Revised Charter.

Unfortunately, despite the fact that states are often taking years to bring their behaviour into conformity with the ESC rights, up to this date the CoM has not yet issued any Recommendation or Resolution regarding the rights protected under Article 11(3). When it comes to the Collective Complaints system, as discussed above, regarding the *Marangopoulos* decision the CoM adopted a quite bland Resolution two years after the ECSR adopted its decision on the merits in this case.

First we will look at the conclusions related to the previously discussed decision on *Maragngopoulos Foundation v Greece*. After Greece sent its 19th Report to the ECSR on,

[510] Ibid.

inter alia, Article 11, for the period 01/01/2003 – 31/12/2007,[511] the ECSR adopted its Conclusions. In them it again concluded that Greece is in non-conformity with requirements set out under Article 11(3) of the Revised Charter. The ECSR noted progress in Greece's policies on the prevention of avoidable risks-reduction of environmental and other issues examined under Article 11(3); however, in most of the issues it requested further information.[512] Furthermore, the ECSR focused on the *Marangopoulus Foundation for Human Rights* complaint where the CoM found the measures taken by the authorities to improve the situation were insufficient. The ECSR took note of the information provided by the Greek Government in its latest report and noticed that it is quite similar to that provided in its submissions in the case. It concluded that the situation was still not in conformity with Article 11(3) on the ground that it had not been demonstrated that sufficient measures had been adopted during the reference period to improve the right to a healthy environment of persons living in lignite mining areas.[513]

Obviously, putting the situation in conformity with the Article 11(3) requirements is a long process. The important thing is that both the ECSR and, we might say, the CoM are closely monitoring the situation and the fact that the case was decided and supervised under the ESC did not diminish its relevance.

Now, the reports and conclusions on Turkey, Italy, Romania and United Kingdom, that were respondent states in the above analysed Court cases on the right to a healthy environment, will be looked at. In relation to Russia, there is currently no information. The Russian Federation signed the Revised ESC on 14 September 2000 and it ratified it on 16 October 2009. It has accepted 67 of the Revised Charter's 98 paragraphs, including all three paragraphs of Article 11. The first report to be submitted by the Russian Federation on the implementation of the Revised Charter was due by 31 October 2011 but it did not concern Article 11 on the right to health.

In March 2009 Turkey submitted its 15th report on the Original Charter and 1st report on the Revised Charter on the accepted provisions of Thematic Group 2 "Health, social

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511 19th report on the implementation of the European Social Charter and 5th report on the implementation of the 1998 Additional Protocol submitted by the Government of Greece (Articles 3, 12 and 13 for the period of 01/01/2005-31/12/2007; Articles 11, 14 and Article 4 of the Additional Protocol for the period 01/01/2003-31/12/2007), Cycle 2009, RAP/Cha/GR/XIX(2009).
512 ESC, ESCR Conclusions XIX-2 (2009) (GREECE), Articles 3, 11, 12, 13, 14 and Article 4 of the Additional Protocol of the Charter (CoE Publishing 2010), 15-18.
513 Ibid, 18.

security and social protection" (Articles 3, 11, 12, 13, 14, 23 and 30). Conclusions in respect of these provisions were published in January 2010. In its report Turkey presented in detail all the administrative and legislative work it is doing on the provisions mentioned above.[514] In its Conclusion, in respect of Article 11(3), the ECSR stated that it took note of the information contained in the report submitted by Turkey. However, it also noted that much of the information needed to assess the situation was lacking. It considered that if the information requested later in its Conclusion is not provided in the next report there will be nothing to show that the situation in Turkey is in conformity with this provision of the Revised Charter. Since the information is lacking on all of the Article 11(3) aspects the ECSR decided to defer its conclusion pending receipt of the information requested.[515] The same conclusion was adopted regarding Romania where again the ECSR could not reach a final conclusion regarding conformity or non-conformity due to lack of information, so it decided to defer its conclusion.[516]

In the same 2009 Conclusions regarding Italy the ECSR stated that although some information is still awaited, the situation in Italy is in conformity with Article 11(3) of the Revised Charter.[517] Finally, in the 2009 Conclusions on the UK on Article 11(3) of the Original Charter (the UK has not ratified the Revised Charter) the ECSR concluded that the situation in the UK is in conformity with Article 11(3) of the Charter. [518]

Therefore, states can be and some are in conformity with the Article 11(3) requirements and the ECSR Reporting system is dealing with all the environmental risks one country is facing. From the 2009 Conclusions on the Revised Charter one can see that out of twenty three states that have accepted Article 11(3) ten have been found to be in conformity, in relation to eight states the ECSR decided to defer its conclusion while

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514 European Social Charter, 15th National Report on the Implementation of the European Social Charter and 1st National Report on the implementation of the European Social Charter (revised) submitted by the government of Turkey, Articles 11, 12, 13 & 14 for the period between January 1, 2003 to July 31, 2007 (1961 Charter) and August 1, 2007 to December 31, 2007 (Revised Charter) Articles 3, 23 & 30 for the period between August 1, 2007 to December 31, 2007 (Revised Charter) Cycle 2009 RAP/RCha/TU/I(2009), 18-20.

515 Ibid.

516 ESC (Revised), ECSR Conclusions 2009 (Romania), Articles 3, 11, 12 and13 of the Revised Charter (CoE Publishing), 16-17.

517 ESC (Revised), ECSR Conclusions 2009 (Italy), Articles 3, 11, 12, 13, 14, 23 and 30 of the Revised Charter (CoE Publishing 2010), 17-18.

518 ESC, ECSR Conclusions XIX- 2 (2009) (United Kingdom), Articles 3, 11, 12, 13 and 14 of the Charter (CoE Publishing 2010), 13-17.

five were found to be in non-conformity.[519] In the Conclusions from the same year but on the Original Charter, the ECSR found eleven out of fifteen states to be in conformity with Article 11(3) while only two were found to be in non-conformity.[520] The number of states that are in conformity and the improvements states are making suggests that the Charter and the pressure of the Reporting procedure are (at least to some extent) the cause of this. Of course, this system is not ideal because of its non-binding form and long time periods between the country reports. However, within the CoE it is the most detailed and the most regular way to supervise the countries methods of dealing with the environmental risks.

5.11 CONCLUSION

The ECSR has not developed nearly as significant or numerous case-law as the Court, since the Collective Complaints system has been in operation only since 1998 and only 15 Member States to the CoE have so far accepted it. Another disadvantage of the Collective Complaints system is the absence of a judicial body, with only the ECSR which at most can be called a 'quasi-judicial' body. However, the number of complaints is increasing and the awareness of protection of economic and social rights through the system of Collective Complaints is growing. On the other hand, the Reporting system on Article 11(3), despite having the same disadvantages as the Collective Complaints system- a small number of states that have accepted Article 11(3) and the ESCR conclusions are of a non-binding character, shows that it is the most detailed supervising process of environmental hazards. The ECSR is looking at all the elements necessary for fulfilling the healthy environment conditions, which are numerous, and is placing pressure on states to bring the situation in conformity with Article 11(3).

Furthermore, there are two other problematic issues under the ESC system that cannot be ignored. First, the more information the ECSR requires from State parties to provide

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[519] States that are found to be in conformity with Article 11(3) of the Revised Charter are: Estonia, Finland, France, Italy, Lithuania, Malta, Netherlands, Norway, Slovenia and Sweden. ESC (Revised), ECSR Conclusions 2009- Volume I (Albania, Andorra, Armenia, Azerbaijan, Belgium, Bulgaria, Cyprus, Estonia, Finland, France, Georgia, Ireland, Italy) (CoE Publishing 2010), 16.

[520] States that are found to be in conformity with Article 11(3) of the Original Charter are: Austria, Croatia, Czech Republic, Denmark, Germany, Hungary, Iceland, Luxemburg, Poland, Spain and United Kingdom. ESC, ECSR Conclusions XIX-2 (2009) (Austria, Croatia, Czech Republic, Denmark, Germany, Greece, Hungary, Iceland, Latvia, Luxembourg, Poland, Slovakia, Spain, "the Former Yugoslav Republic of Macedonia", United Kingdom) (CoE Publishing 2010), 16.

for it to be able to make a judgment about their compliance with the Article 11(3) obligations, the more difficult it becomes for the ECSR to make a definite judgment about such compliance.[521] This is evident from all the ECSR conclusions where it decided to defer its conclusion, and, as we have seen in the previous Section, there are quite a few such conclusions. Another and even bigger disadvantage and problematic issue of both the ECS Reporting and Collective Complaints system is the ineffectiveness of the CoM and its unwillingness to issue Recommendations and Resolutions. Furthermore, even when it adopts them, they are rather vague and bland. Unfortunately, we have seen that the CoM is the same when supervising the execution of the Court's judgments, and it places rather mild, if any, pressure on states.

On the other hand, the ECHR system is seriously over-burdened now and it is not wise for the Court to extend its interpretation of Convention rights into the area of protecting the right to a healthy environment. Both the Court and the ECSR have admitted that healthy environment is something that cannot be achieved immediately but can only be achieved gradually. Although nowadays there is a tendency to abandon the distinction between economic and social and civil and political rights, the fact that they are guaranteed under two separate documents remains. After looking at the ESC Reporting and the Collective Complaints system with a special overview on the right to healthy environment, it is can be concluded that, although there are still problematic issues, the right to a healthy environment can be protected under the ESC system. Furthermore, it seems that the Court and the ECSR are starting to duplicate each other's work, and in my opinion that is not a solution to be welcomed.

The ESC system is developing, together with its machinery of protection. The ECSR and the CoE bodies should focus on improving the ESC system, including the protection of the right to a healthy environment. The right to a healthy environment should primarily be a collective right and not an individual right, since the effects of pollution or any other kind of environmental hazard will generally effect a large group of people, not just one individual. Since the Court deals only with individual complaints and the ECSR with collective ones the Court should not deal with the healthy environment issue, but only the ECSR. As stated by Margared DeMerieux: "Central to the idea of environmental rights and of the protection of the environment is that the

[521] Khaliq and Churchill, 'The European Committee of Social Rights: putting flesh…' (n 29), 452.

interests of *populations as a whole* and indeed of *unborn generations* are crucial."[522] Also, environment disasters should be prevented rather than treated after they have happened which is only possible under the ESC system. And if the CoE bodies try to improve the ESC system and make the Reporting procedure together with the system of Collective Complaints as effective as possible, the environmental threats to people living in a particular territory might be much better protected then under the Convention. The CoE bodies should urge states to ratify the Collective Complaints Protocol[523] as well as the CoM to start bringing recommendations to states, recommendations that are not mild and bland, both under the Collective Complaints and the Reporting procedure.

The ECHR's biggest contribution to the human rights protection in Europe is that it protects individuals against state actions and that it imposed positive obligations on the state to protect individuals from various types of human rights violations. When it comes to the right to healthy environment, it is not an issue that should be left for the Convention and the Court. The Court should not deliver judgments concerning the right to a healthy environment, since it has numerous socio-economic elements. Environmental hazards on most occasions affect hundreds or thousands of people and the execution of such judgment can only be achieved progressively with substantial financial expenditure. Instead of entering this sphere, when an application that concerns the right to live in a healthy, sound and viable environment comes before the Court, it should not deal with it. One way of doing so might be that the Court could announce in the next environmental case that all future environmental applications will be declared incompatible *ratione materiae* with the provisions of the Convention or the Protocols thereto (based on Article 35(3)(a) of the Convention), and therefore inadmissible.[524]

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[522] DeMerieux (n 423), 534.

[523] See for example Parliamentary Assembly Recommendation 1795 (2007) 'Monitoring of commitments concerning social rights'. Text adopted by the Standing Committee, acting on behalf of the Parliamentary Assembly, on 24 May 2007. "The Assembly therefore recommends that the Committee of Ministers:
11.1. take the necessary measures to ensure that member states that have not already done so ratify the revised European Social Charter, the Protocol amending the European Social Charter and the Additional Protocol to the European Social Charter Providing for a System of Collective Complaints and grant national NGOs the right to lodge complaints." [11].

[524] See *Practical Guide on Admissibility Criteria* (CoE 2011), 44-45; White and Ovey (n 27), 33-34; Janis, Kay and Bradley (n 26), 47-49; Harris, O'Boyle and Warbrick (n 25), 800-801; and case *Pančeko v Latvia* App No 40772/98 (ECtHR Decision, 28 October 1999).

CHAPTER VI

THE RIGHT TO HEALTHCARE

6.1 INTRODUCTION

The Convention contains no references to healthcare rights. The right to healthcare is a traditional socio-economic right; however, the issue of providing healthcare in general has also been raised before the Court, mainly in relation to Article 2 and Article 8.

It has been shown through the previous chapters that the Court is now often using an integrated approach[525] when interpreting the Convention rights. This approach is predicated on the indivisibility of all human rights and "recognizes that, on the one hand, the enjoyment of civil and political rights requires respect for and promotion of social rights and, on the other hand, that social rights are not second best to civil and political rights."[526] On that, one might say that the integrated approach has the advantage of opening the door to creative possibilities for litigation of social rights and re-conceptualizing of the contours of civil and political rights.[527] What also might be said, and is also in a way expected, is that the Court's use of integrated approach and dynamic interpretation will include the right to healthcare in general, at least to some degree, in the Convention, particularly after seeing in chapters IV and V how far the Court has gone in its dynamic interpretation of the right to satisfactory detention conditions and healthcare in prisons and the right to a healthy environment.

However, it looks as if the right to healthcare is an area where the Court has decided to make a distinction between the two categories of rights. In this chapter the Court's approach towards the right to healthcare will be analysed, together with my opinion on why the Court has not gone further and why that is a good thing. Jurisprudence on Articles 2 and 8, in relation to healthcare rights, will be discussed. Furthermore, cases concerning violation of Article 2 due to the lack of appropriate medical services in prisons which were not examined in chapter IV will be analysed. Later on, jurisprudence

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525 White and Ovey (n 27), 75.
526 Ibid.
527 Alicia Ely Yamin, 'The Future in the Mirror: Incorporating Strategies for the Defense and Promotion of Economic, Social and Cultural Rights into the Mainstream Human Rights Agenda' (2005) 27 HUM. RTS. Q. 1200, 1219 (analyzing strategies for the realization of economic, social, and cultural rights based on the indivisibility of all human rights).

of the Convention's organs on Article 8 regarding the right to healthcare will be presented followed by the deportation cases where the applicants invoked violation of Article 3 because of the lack of satisfactory (or any) healthcare in the countries where they were supposed to be deported, as connected with the right to healthcare. Finally, the right to health as protected under the ESC will be analysed. The collective complaints and the reports on Article 11 will be discussed. In my opinion, the ESC is a better instrument for healthcare issues, and the reasons for that line of thinking will be presented in sections 6.7.-6.9. of this chapter.

6.2 THE ECHR AND THE RIGHT TO HEALTHCARE

There have been several cases where the Court explored the possibility of protecting the right to health or/and the right to healthcare. Here, the issue is not the right to healthcare in detention but in society in general. The issue of providing healthcare in detention has been discussed in chapter IV. In that chapter the development of the Court's jurisprudence regarding the right to have satisfactory detention conditions and the right to healthcare of the persons deprived of their liberty has been discussed. What I have tried to show is that these judgments have significant socio-economic elements since they are financially demanding, on numerous occasions affect the whole population in a detention centre and cannot be executed within a short time period and in my opinion, are compromising the importance of Article's 3 absolute nature. Most importantly, the right to health is already guaranteed under the ESC.

Here the right to health and the right to healthcare in general will be discussed and what will be shown is that these rights are not included in the Convention nearly as frequently as the right to a healthy environment and the right to satisfactory detention conditions and healthcare in detention. Moreover, most of the 'healthcare cases' have not even passed through the admissibility stage.

6.2.1 POSITIVE OBLIGATIONS UNDER ARTICLE 2 OF THE CONVENTION

The issue of providing healthcare has mainly been raised before the Court in relation to Article 2. Article 2 of the Convention is formed as a negative right, i.e. it is cast as a negative obligation.[528] However, as with numerous Convention provisions, through the Court's jurisprudence Article 2 started imposing positive obligations on the states. In the first case before the Court involving Article 2, *McCann and Others v the United Kingdom,*[529] the applicants contended that first paragraph of Article 2 imposed positive duty on states to protect life. However, the Court decided to examine this case under the notion of proportionality of Article 2(2), examining whether the control and organisation of that anti-terrorist operation complied with Article 2(2).[530]

Nevertheless, later in its jurisprudence the Court held that Article 2 contains positive obligations, such as the obligation to investigate unexplained deaths of those in the custody of state officials,[531] to take action to prevent persons from being killed by private individuals,[532] and the obligation to take appropriate steps to safeguard the lives of those within their jurisdiction.[533] As will be discussed now, these positive obligations have been to some extent extended into the sphere of healthcare.

6.3 ARTICLE 2 AND THE RIGHT TO HEALTHCARE IN GENERAL

There is a developing jurisprudence of the Court where it considers Article 2 as being capable of encompassing obligations on states to provide medical facilities and

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[528] Article 2(1): Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

[529] *McCann and Others v United Kingdom* (1996) 21 E.H.R.R. 97.

[530] Ibid. The Court found that although there was no premeditated plan to kill the suspects, there had been a breach of Article 2 of the Convention as the authorities had shown a lack of appropriate care and control in carrying out the operation by instructing their soldiers to act on their intelligence assessments which failed to account for a possible margin of error and which were, in the event, erroneous.

[531] For example in already mentioned case *McCann and Others v United Kingdom* (n 529) but also in numerous other cases like *Ergi vTurkey* (2001) 32 E.H.R.R. 18; *Ilhan v Turkey* (n 376); *Akkoc v Turkey* (2002) 34 E.H.R.R. 51; and *Paul and Audrey Edwards v United Kingdom* (2002) 35 E.H.R.R. 19.

[532] *Osman v United Kingdom* (n 81).

[533] *Budayeva and Others v Russia* (n 476).

services.[534] However, as will be shown through this chapter, the Court has shown great reluctance in dealing with the right to healthcare in general.

The possibility of a duty to provide medical services was first explored by the Court in *L.C.B. v United Kingdom* (already partially analysed in chapter V). Here, the Court did not find it established that, given the information available to the State at the relevant time concerning the likelihood of the applicant's father having been exposed to dangerous levels of radiation and of this having created a risk to her health, it could have been expected for the State to act of its own motion to notify her parents of these matters or to take any other special action in relation to her. It followed that there has been no violation of Article 2. However, the Court stressed that obligations under Article 2 require from the state not only to refrain from the intentional or unlawful taking of life, but also to take all the appropriate steps to safeguard lives of those within their jurisdiction.[535]

The next case where health-related issues were raised was *Erikson v Italy*[536] which concerned alleged medical malpractice. The applicant complained that his mother's right to life was violated on account of the failure of the Italian authorities to exercise their best efforts to identify those responsible for her death and invoked Article 2. The Court in its assessment of the case pointed out that:

"In particular, the positive obligations a State has to protect life under Article 2 of the Convention include the requirement for hospitals to have regulations for the protection of their patients' lives and also the obligation to establish an effective judicial system for establishing the cause of a death which occurs in hospital and any liability on the part of the medical practitioners concerned."[537]

Nevertheless, the Court found this case manifestly ill-founded and therefore inadmissible since it did not disclose any failure by the respondent State to comply with the positive obligations imposed by Article 2 of the Convention.

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[534] Mowbray, *The Development of Positive Obligations*… (n 23), 22.
[535] *L.C.B. v United Kingdom* (n 471) [36]. See also *Roche v United Kingdom* (2006) 42 E.H.R.R. 30 where the applicant was suffering from health problems as a result of his exposure to toxic chemicals carried out on him while he was serving in the British army. He complained that he had been denied proper access to his service medical records in breach of Articles 6, 8 and Article 1 of Protocol No.1. As to Article 8, the Court found that Article 8 had been breached as there had been a failure to provide an effective and accessible procedure that would have allowed the applicant to access relevant and appropriate information so that he could then assess the risk caused by the exposure.
[536] *Erikson v Italy* (2000) 29 E.H.R.R. CD152.
[537] Ibid.

In another related case, *Calvelli and Ciglio v Italy*, the applicants alleged a violation of Articles 2 and 6(1) on the ground that owing to procedural delays a time-bar had arisen making it impossible to prosecute the doctor responsible for the delivery of their child, who had died shortly after birth.[538] The Court found Article 2 applicable and repeated Article's 2 principle which puts an obligation on the state to take appropriate steps to safeguard lives. Furthermore it, just like in *Eriskon*, stated the requirements and principles that apply in public sphere, namely in hospitals.[539] Nevertheless, the Court found no violation of Article 2.

Therefore, states are under an obligation to have regulations under which measures for the protection of patients' lives will be adopted. However, in neither of these cases was the issue of providing healthcare in general mentioned by the Court.

Later on, in *Nitecki v Poland*[540] the applicant complained under Article 2 that the refusal to refund the full price of a life-saving drug violated his right to life. In that connection, he submitted that he had been making social security contributions for over thirty-seven years. The applicant could not afford to pay 30% of the price of the required drug and therefore could not follow the prescribed pharmaceutical treatment. Consequently, his medical condition deteriorated and his invalidity was assessed at the highest degree. Although he was one of only two amyotrophic lateral sclerosis (ALS) sufferers in Poland who had survived longer than four years, the fact was that inability to follow the prescribed pharmaceutical treatment would result in his untimely death. The Court referred to the aforementioned statements about the obligations of States parties with regard to healthcare measures.[541] Although the Court did find this application manifestly ill-founded the important thing to mention here is that it attached importance to the fact that Poland did in fact refund 70% of the cost of the drug and concluded:

"Bearing in mind the medical treatment and facilities provided to the applicant, including a refund of the greater part of the cost of the required drug, the Court considers that the respondent State cannot be said, in the special circumstances of the present case, to have failed to discharge its obligations under Article 2 by not paying the remaining 30% of the drug price."[542]

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538 *Calvelli and Ciglio v Italy* App no 32967/96 (ECtHR, 17 January 2002).
539 Ibid [49].
540 *Nitecki v Poland* App no 65653/01 (ECtHR Decision, 21 March 2002).
541 See *Erikson v Italy* (n 536).
542 Ibid.

Since the Court stressed special circumstances of the case, it could have taken into account that for the applicant the amount the state refunded did not make a difference since he could not afford even 30% and because of that he has been denied the right to healthcare which caused deterioration of his health. However, as it did not do so we can only speculate the Court's judgment and reasoning if the state had not refunded 70 % of the drug price.

Similar circumstances occurred in *Pentiacova and Others v Moldova*[543] where almost all of the 49 applicants were suffering from chronic renal failure and consequently they needed haemodialysis. They were all disabled on account of their disease and receiving state disability allowances. The applicants submitted that before 1997 the expense of their haemodialysis was covered entirely by the hospital. Between 1997 and 2004 the hospital's budget was reduced and only strictly necessary procedures and medication were provided free to them. From January 2004 the situation became more or less identical to that existing before 1997, with the exception of the frequency of haemodialysis session. In their application, they complained about the failure of the state to provide all the medication necessary for haemodialysis at public expense and about the poor state financing of the haemodialysis section of the Spitalul Clinic Republican. They also alleged that on account of the insufficient financing some of them were forced to have two instead of three haemodialysis sessions per week. Accordingly, the applicants argued that their right to life under Article 2 had been breached.

The Court first examined this issue under Article 8 and found it manifestly ill-founded. As to the alleged violation of Article 2 it repeated the above expressed principles on the state's duty to take appropriate steps to safeguard lives. The Court furthermore noted that the applicants had failed to adduce any evidence that their lives had been put at risk. It pointed out that chronic renal failure is a very serious progressive disease with a high rate of mortality, not only in Moldova but throughout the world. The fact that a person had died of this disease was not, therefore, in itself proof that the death was caused by shortcomings in the medical care system. The Court therefore found that the complaint under Article 2 was also manifestly ill-founded. However, the Court did not reject the idea that the state may be under an obligation to provide healthcare measures but

[543] *Pentiacova and 48 Others v Moldova* (2005) 40 E.H.R.R. SE23.

emphasised that there needs to be a direct causal link between the applicants' deaths and the shortcomings in the medical care system in order for a state to be under obligation.

Another important statement was made by the Court in this case, as well as in the above discussed *Nitecki* case and in one of the rare inter-state cases, *Cyprus v Turkey*. The Court emphasized that:

"Moreover, an issue may arise under Article 2 where it is shown that the authorities of a Contracting State put an individual's life at risk through the denial of health care which they have undertaken to make available to the population generally."[544]

The facts of *Cyprus v Turkey* are complex and concern numerous claims of violations, but regarding healthcare issues it is important to note that the applicant Government claimed that the Greek-Cypriots living in the northern part of Cyprus were denied the right to avail themselves of medical services in the southern part of Cyprus and that the facilities in the north were inadequate. In relation to those allegations the Court took note of the fact:

"..(T)hat the Commission was unable to establish on the evidence that the "TRNC" authorities deliberately withheld medical treatment from the population concerned or adopted a practice of delaying the processing of requests of patients to receive medical treatment in the south. It observes that during the period under consideration medical visits were indeed hampered on account of restrictions imposed by the "TRNC" authorities on the movement of the populations concerned and that in certain cases delays did occur. However, it has not been established that the lives of any patients were put in danger on account of delay in individual cases. It is also to be observed that neither the Greek-Cypriot nor Maronite populations were prevented from availing themselves of medical services including hospitals in the north. The applicant Government is critical of the level of health care available in the north. However, the Court does not consider it necessary to examine in this case the extent to which Article 2 of the Convention may impose an obligation on a Contracting State to make available a certain standard of health care"[545]

A similar statement was made by the Commission in an admissibility decision from 1998, *Scialacqua v Italy,* where the applicant requested a refund from Italian health service for his treatment at the herbalist which was helpful for his liver. It stated:

"However, even assuming that Article 2 (Art. 2) of the Convention can be interpreted as imposing on States the obligation to cover the costs of certain medical treatments or medicines that are essential in

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[544] *Pentiacova and 48 others v Moldova* (n 543); *Nitecki v Poland* (n 540); and *Cyprus v Turkey* (2002) 35 E.H.R.R. 30 [219].
[545] *Cyprus v Turkey* (n 544), [219].

order to save lives, the Commission considers that this provision cannot be interpreted as requiring States to provide financial covering for medicines which are not listed as officially recognised medicines."[546]

Both the Court and the Commission leave the question about the minimum level of healthcare needed under the Convention open and they do not want to be drawn into making a framework or creating standards about a possible minimal level of healthcare. The Court strictly emphasized that it does not consider it necessary to examine the extent to which Article 2 of the Convention may impose an obligation on states to make available a certain standard of healthcare.

Up to now there have not been any cases brought before the Court raising the issue of a necessary minimum of healthcare. According to L. Clements and A. Simmons the Court might find a violation of the Convention where there has been a failure to provide basic medical care which led to death or some kind of serious injury.[547] As an example they used a Croatian case reported by the ERRC where a local hospital refused to send an emergency medical team to care for a pregnant woman living in a Roma settlement who had gone into labour. The child was stillborn when delivered.[548] However, the fact is that this (or a similar case) never came before the Court so we can only speculate the Court's ruling on the case.

From the above survey of the case-law, there are some suggestions that the issue of providing healthcare may be of relevance, for example, in certain cases in which a state may/will be under an obligation to provide healthcare to preserve life under the Convention's Article 2. Still, there is no clear evidence or a judgment which might allow us to say with certainty whether the Court is willing to protect the right to a healthcare in general under the aegis of Article 2 of the Convention.[549]

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[546] *Scialacqua v Italy* (1998) 26 E.H.R.R. CD164 (ECtHR Decision).
[547] Luke Clements and Alan Simmons 'European Court of Human Rights, Sympathetic Unease' in Langford (ed), *Social Rights Jurisprudence*… (n 29), 418.
[548] Ibid.
[549] The HRC also emphasized the need for positive measures from states. It has pointed out much more clearly socio-economic aspect of the right to life than the Court did. "Moreover, the Committee has noted that the right to life has been too often narrowly interpreted. The expression "inherent right to life" cannot properly be understood in a restrictive manner, and the protection of this right requires that States adopt positive measures. In this connection, the Committee considers that it would be desirable for States parties to take all possible measures to reduce infant mortality and to increase life expectancy, especially in adopting measures to eliminate malnutrition and epidemics." HRC, General Comment No. 6 Article 6 (Right to life), Sixteenth session, 1982. U.N. Doc. HRI\GEN\1\Rev.1 at 6 (1994 [5].

6.4 ARTICLE 2 AND THE ISSUE OF HEALTHCARE IN DETENTION

We have seen in chapter IV that the Court has been willing to consider the right of prisoners to healthcare services. There are two further cases where the Court found a violation of Article 2 due to the lack of appropriate medical services which were not examined in chapter IV. The reason for this is that here the detention conditions or Article 3 rights were not an issue at all, therefore no general detention problems were raised but they concerned only these particular applicants.

The first case is *Velikova v Bulgaria*[550] where the applicant's partner, Mr. Tsonchev, was taken into police custody on suspicion of cattle theft. He had consumed alcohol prior to his arrest but was in good physical health, with no ailments or visible injuries. Police testimony stated that Tsonchev said he was feeling unwell. The physician who was called to the station at that time testified that Tsonchev was too drunk to be examined. Police testimony then stated that, after vomiting in his cell, Tsonchev was left in the hallway where he fell on the floor. At 2 a.m. on the day after his arrival to police custody, the same physician arrived again at the station and found Tsonchev dead. A forensic expert carried out a post-mortem examination and found the cause of death to be an acute loss of blood resulting from large and deep haematomas on the upper limbs and the buttocks. Before the Court, the Government was not able to produce any documentary records concerning the medical care given to Mr Tonchev. The Court found:

"That there is sufficient evidence on which it may be concluded beyond reasonable doubt that Mr Tsonchev died as a result of injuries inflicted while he was in the hands of the police. The responsibility of the respondent State is thus engaged.

The Court also finds that there is no evidence of Mr Tsonchev having been examined with the care one would expect from a medical professional at any time while in custody, and suffering from severe injuries"[551]

It therefore concluded that there has been a violation of Article 2 in respect of the death of Mr Tsonchev.

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[550] *Velikova v Bulgaria* App no 41488/98 (ECtHR 18 May 2000).
[551] Ibid [74]-[75].

In a subsequent Bulgarian case, *Anguelova v Bulgaria*,[552] the Court again found a breach of Article 2 due to the failure of the authorities to provide timely medical care to a seriously injured detainee. This case was lodged by the mother of 17-year-old Zabchekov. He had been arrested by the police on suspicion of theft and all the witnesses were unanimous that he had been in good health prior to the time of his arrest, with no visible injuries. No written order for his detention was issued. The sergeant on duty stated that he noticed a bruise on Zabchekov's eyebrow. When the sergeant later returned to check on Zabchekov, he noticed that Zabchekov was sleeping and shivering, and decided to move him to a warmer office. He also noticed that Zabchekov was breathing heavily. A few hours later the officers present at the time of his arrest drove to the hospital and returned with a paediatrician, who until then had not been given any information regarding Zabchekov's condition. Zabchekov was found to be dead by the time he arrived at the hospital. The Court observed that the officers delayed the provision of medical assistance to Mr Zabchekov and that that contributed in a decisive manner to the fatal outcome. The Court found that the behaviour of the police officers and the lack of any reaction by the authorities constituted a violation of the State's obligation to protect the lives of persons in custody. Therefore, there had been a violation of Article 2 of the Convention.[553]

In these cases the Court found a violation of Article 2 due to the fact that both the injuries and the non-providing of medical treatment were caused directly by a state authority. The respective applicants' partner and son were under the full control of the state authority which led the Court to conclude that it was their obligation to provide an adequate, timely and satisfactory medical assistance. This maturation of the positive obligations remained only in the context of detention. The reason for that is the fact that when the persons are under the full control of the state authorities, the Court has higher expectations from the authorities regarding the protection of individuals. When it comes to providing medical assistance and healthcare for individuals deprived of their liberty, the Court has shown willingness in providing judicial protection for those individuals. The same principle may apply when people are in hospital which the Court

[552] *Anguelova v Bulgaria* (2004) 38 E.H.R.R. 31.
[553] Ibid [125]-[131].

expressed in *Erikson* decision.[554] However, for the individuals that are not deprived of their liberty the Court has been much more reluctant in finding a violation.

6.5 ARTICLE 8 AND THE RIGHT TO HEALTHCARE

There is jurisprudence from the Convention's organs on Article 8 regarding the right to healthcare. They have kept the same restraint when deciding the healthcare issues under Article 8 as they have under Article 2, until 2011. However, in 2011 the Court delivered a judgment, *Georgel and Georgeta Stoicescu v Romania*[555] in which it, rather surprisingly, found a state to be in violation of Article 8 for not introducing general and preventive measures for protecting the applicant's health. Besides this judgment there are two decisions, one adopted by the Court and another by the Commission, which are relevant for this thesis.

The first one is an admissibility decision made by the Commission, *Passannate v Italy*.[556] Here, the applicant complained that she had to wait about five months in order merely to book a specialist's visit in an Italian public hospital while she would have been able to see the same specialist in the same hospital within only four days if she had been able to pay 150,000 Italian lire. The Commission stated:

"The Commission notes the Italian public health service is based on compulsory contributions which entitle those who pay them to certain services, among which medical examinations within public hospitals.

Therefore, the Commission considers that, in such circumstances where the State has an obligation to provide medical care, an excessive delay of the public health service in providing a medical service to which the patient is entitled and the fact that such delay has, or is likely to have, a serious impact on the patient's health could raise an issue under Article 8 para. 1 (Art. 8-1) of the Convention."[557]

However, in this case the applicant did not prove nor even allege that the above delay had a serious impact on her physical or psychological conditions and the Commission found the application manifestly ill-founded. Again, like as the Article 2 case *Pentiacova and 48 Others v Moldova*, the lack of causal link was the reason for dismissing the case.

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[554] See *Erikson v Italy* (n 536).
[555] *Georgel and Georgeta Stoicescu v Romania* (n 231).
[556] *Passannante v Italy* (1998) 26 E.H.R.R. CD153.
[557] Ibid.

In a later case, *Sentges v Netherlands*,[558] the Court decided that positive duties under Article 8 did not extend to the state's obligation to provide a severely disabled person with a robotic arm. The applicant, who was represented by his mother, suffered from Duchenne Muscular Dystrophy (DMD), a disease characterised by progressive muscle degeneration, loss of the ability to walk and often the loss of lung or cardiac functions. There is currently no known cure for DMD and most affected people survive into their twenties. The applicant was unable to stand, walk or lift his arms, and his manual and digital functions were virtually absent. He had to use an electric wheelchair to move about, both outside the home and at school. On 20 July 1999 the applicant's parents requested their health insurance fund to provide him with a "MANUS Manipulator", a robotic arm specifically designed to be mounted on electric wheelchairs in order to give disabled people more autonomy in handling objects in their environment. It was predicted that after being provided with the robotic arm, the applicant's dependence on the constant presence of carers would be reduced by at least one to three hours a day. The health insurance fund rejected the request for the reason that the provision of a robotic arm was not covered by any social insurance scheme. The parents' various appeals against this decision all failed. The applicant submitted that refusal of his request to be provided with a robotic arm infringed his right to respect for his private life, as guaranteed by Article 8. The Court rejected his complaint as manifestly ill-founded. It stated that:

"Even assuming that in the present case such a special link indeed exists – as was accepted by the Central Appeals Tribunal –, regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole and to the wide margin of appreciation enjoyed by States in this respect in determining the steps to be taken to ensure compliance with the Convention (see *Zehnalovà and Zehnal*, cited above).

This margin of appreciation is even wider when, as in the present case, the issues involve an assessment of the priorities in the context of the allocation of limited State resources (see, *mutatis mutandis*, *Osman v. the United Kingdom*, judgment of 28 October 1998, *Reports* 1998-VIII, p. 3159, § 116, *O'Reilly and Others v. Ireland* (dec.), no. 54725/00, 28 February 2002, unreported). In view of their familiarity with the demands made on the health care system as well as with the funds available to meet those demands, the national authorities are in a better position to carry out this assessment than an international court. In addition, the Court should also be mindful of the fact that, while it will apply the Convention to the concrete facts of this particular case in accordance with Article 34, a decision issued in an individual case will nevertheless

[558] *Sentges v Netherlands* (2004) 7 C.C.L. Rep. 400.

at least to some extent establish a precedent (see *Pretty*, cited above, § 75), valid for all Contracting States."[559]

Here, unlike in *Passannate* the Court recognised the existence of a causal link, however it invoked the state's margin of appreciation. The Court emphasized that the applicant had access to the primary, basic healthcare and every aspect of healthcare that goes beyond that basic standard was within the state's margin of appreciation. It is also interesting to mention that the Court invoked the possibility of this case establishing a precedent which would, had the Court found a violation, extend the scope of Article 8 into healthcare rights. Again, limited state resources were, unlike in the detention conditions cases, of importance when deciding whether a violation occurred.

Therefore, when it comes to Article 8 and the right to healthcare the Court largely relied on the state's margin of appreciation when it came to every issue beyond the basic healthcare leaving to states to arrange their healthcare system in accordance with the available state resources. We can assume that it was exactly because of the scarcity of state resources.

However, in the *Georgel and Georgeta Stoicescu v Romania* case the Court narrowed the state's margin of appreciation when it comes to preventive healthcare measures and invoked the doctrine of effectiveness. This case is conceptually different from the *Passannate* and *Sentges* cases since those two cases were concerned with the provision of healthcare, whereas in *Stoicescu*, the thrust of the complaint is that the state was the cause of the applicant's medical condition. The case concerned the Bucharest authorities' failure to protect a 71-year-old woman, who was left disabled after being attacked by a pack of stray dogs. At the relevant time, the large numbers of stray dogs in Romanian cities was already a public health and safety issue. Relying in particular on Article 8, Ms Stoicescu (who later during the proceedings died so her husband continued with the application) complained that she had been attacked by a pack of stray dogs because the local authorities had failed to take adequate measures to control stray dogs in Bucharest.

The Court, in its assessment first invoked positive obligations inherent in Article 8.[560] It went on by emphasizing that positive obligations to adopt appropriate measures must be interpreted in a way that does not impose an impossible or disproportionate burden

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[559] Ibid.
[560] *Georgel and Georgeta Stoicescu v Romania* (n 231) [48]-[50].

on the authorities However, it stressed that the authorities had broad and detailed information on the large number of stray dogs in the city of Bucharest and the danger they represented to the physical integrity and health of the population. The Court agreed with the Romanian Government that responsibility for the general situation of stray dogs in Romania also lies with civil society and it was not for the Court to determine the best policy for dealing with such public safety problems. Nevertheless, the Court found that the lack of sufficient measures taken by the authorities in addressing the issue of stray dogs in the particular circumstances of the case, combined with their failure to provide appropriate redress to the applicant as a result of the injuries sustained, amounted to a breach of the state's positive obligations under Article 8 to secure respect for the applicant's private life. Therefore, there has been a violation of Article 8.

This judgment was reached with only one dissenting opinion. Judge López Guerra emphasized one very important point:

"In the present case it is obvious that the authorities had no knowledge of the existence of a real and immediate, individual risk to the applicant, but were aware of a general situation of risk that might affect citizens in general, rather than only (and specifically) this individual applicant. According to the Court's case-law, it is certainly justified to require the member State authorities to take action to prevent probable and immediate risks with respect to rights guaranteed under the Convention that affect specific and identified persons. But I do not deem warranted the present extension of this principle to demand that authorities adopt all necessary measures to protect all people from all forms of danger in general. The public powers are required to meet practically unlimited needs with inevitably limited means. They must provide vital services such as clean water, sewer systems, waste disposal, health care, traffic safety and public safety, among many others. And the number of victims of the faulty delivery of those services may be considerable. But it is the competent authorities of each country and not this Court who must establish priorities and determine preferences when allocating efforts and resources."[561]

I agree with this viewpoint. This case is about the state's obligation to take general and preventive measures that concern not only this applicant but the population in general. It concerns the issue of the protection of health since the Court found that the failure of the authorities to adopt general preventive measures concerning stray dogs violated the applicant's right under Article 8. The Court entered into clearly economic issues, stating where the national authorities should allocate their resources. Furthermore, even though this judgment concerns one individual, from the judgment is visible that it also concerns the population in general since there was a lack of general, preventive state measures

[561] Ibid, Partly dissenting opinion of Judge López Guerra.

that led to finding a violation. Also, in 2000 some 22,000 persons had received medical care following attacks by stray dogs and from the beginning of 2001 more than 6,000 persons had been bitten by stray dogs.[562] It is clear that this judgment has numerous socio-economic elements on the state. The CoM is currently waiting an action plan from Romanian authorities regarding the execution of judgment.

As we can see, the Court has up until 2011 refrained from entering the healthcare sphere since it concerns allocation of national resources and left these with this issues wide margin of appreciation to states. However, with the *Georgel and Georgeta Stoicescu* it went one step further, finding a state to be in violation of an individual right by not introducing preventive, general measures that include allocating national, already scarce, resources.

6.6 ARTICLE 3 DEPORTATION CASES IN THE HEALTHCARE CONTEXT

The deportation cases where the applicants invoked violation of Article 3 because of the lack of satisfactory (or any) healthcare in the countries where they were supposed to be deported are connected with the right to healthcare. What is interesting is that one of the first deportation cases regarding healthcare related issues suggested that the Court would be willing to deal with the health and healthcare rights.[563] Although in this case the circumstances were special and dealt with the concept of inhuman and degrading treatment, this case is worth mentioning since it gave interesting indicators to the interpreters of the Convention. However, those indicators were later rejected by the Court. Moreover, following this judgment, a number of decisions of the Court sought to distinguish this case.

The facts of *D. v United Kingdom* are as follows. D., a national of St Kitts, was found in possession of a substantial amount of cocaine upon his arrival in the UK and was convicted of illegally importing a controlled drug and sentenced to six years' imprisonment. By the time he was released, D. was in the advanced stages of AIDS and was provided with accommodation and care by a UK charity, as well as receiving

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[562] Ibid [34].
[563] *D. v United Kingdom* (n 135).

medical treatment for his condition. The immigration authorities ordered D.'s removal to St Kitts and his application for judicial review of that decision and subsequent appeal were dismissed. D. applied to the Court, contending that his removal would breach Article 3, as he would not receive adequate medical treatment and had no family in St Kitts who could care for him. The Court in its assessment of the situation concluded:

"Aside from these situations and given the fundamental importance of Article 3 in the Convention system, the Court must reserve to itself sufficient flexibility to address the application of that Article in other contexts which might arise. It is not therefore prevented from scrutinising an applicant's claim under Article 3 where the source of the risk of proscribed treatment in the receiving country stems from factors which cannot engage either directly or indirectly the responsibility of the public authorities of that country, or which, taken alone, do not in themselves infringe the standards of that Article. To limit the application of Article 3 in this manner would be to undermine the absolute character of its protection."[564]

"Against this background the Court emphasises that aliens who have served their prison sentences and are subject to expulsion cannot in principle claim any entitlement to remain in the territory of a Contracting State in order to continue to benefit from medical, social or other forms of assistance provided by the expelling State during their stay in prison.

However, in the very exceptional circumstances of this case and given the compelling humanitarian considerations at stake, it must be concluded that the implementation of the decision to remove the applicant would be a violation of Article 3."[565]

Although the Court stressed that the notion of inhuman treatment had a specific meaning due to the very exceptional circumstances of the case and that entitlement to care and treatment could not in principle be invoked, to many future applicants (and interpreters of the Convention) this judgment looked as if it opened a space for invoking a right to a healthcare treatment under the Convention.[566] However, in none of the later cases did the Court find the circumstances were so exceptional that the decision to remove the applicant would be a violation of Article 3. It is clear that the *D.* judgment has not established Article 3 as promoting a general right to medical care for individuals facing expulsion from the state. What *D. v UK* represents is a single case and

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564 Ibid [49].
565 Ibid [54].
566 *Bensaid v United Kingdom* (2001) 33 E.H.R.R. 10 (expulsion of schizophrenic to Algeria); *Arcila Henao v Netherlands* App no 13669/03 (ECtHR Decision, 24 June 2003) (Expulsion to Columbia of an HIV-positive drug offender); *Karagoz v France* App no 47531/99 (ECtHR Decision, 15 November 2001) (deportation to Turkey, where the applicant, undergoing continuous medical treatment, claims his life will be at risk due to the absence of the necessary medicines); *Ndangoya v Sweden* App no 17868/03 (ECtHR Decision, 22 June 2004) (Expulsion to Tanzania, where applicant alleges he would be prevented from receiving treatment for HIV); *Salkić and Others v Sweden* App no 7702/04 (ECtHR Decision, 29 June 2004) (expulsion to Bosnia of a family suffering from post traumatic stress syndrome).

it did not establish a minimum core right to treatment of dying patients without anyone to take care of them, or even less a precedent,[567] as one might have expected.

For example, in a later case *N. v the United Kingdom*[568] the applicant (N.), a HIV positive Ugandan national, complained, in particular, that if she were returned to Uganda she would not have access to the medical treatment she required. In this case N., following her entry into the UK, had been diagnosed as HIV positive. She had developed AIDS defining illnesses. Her condition stabilised upon receipt of medication and access to medical facilities in the UK. The secretary of state, after rejecting N.'s asylum claim, dismissed her claim under Article 3 on the basis that all major anti-viral drugs were available in Uganda at highly subsidised prices and that the treatment of AIDS in Uganda was comparable to any other African country. N. argued that, given her illness and the lack of freely available medical treatment, social support or nursing care in Uganda, her removal there would cause acute physical and mental suffering, followed by an early death, in breach of Article 3. As we can see, the facts are quite similar to *D. v UK*. However, the Court said:

"The Court does not exclude that there may be other very exceptional cases where the humanitarian considerations are equally compelling. However, it considers that it should maintain the high threshold set in *D. v United Kingdom* and applied in its subsequent case law, which it regards as correct in principle, given that in such cases the alleged future harm would emanate not from the intentional acts or omissions of public authorities or non-state bodies, but instead from a naturally occurring illness and the lack of sufficient resources to deal with it in the receiving country."[569]

If the above statement is the principle, then even D. would not have succeeded. D. alleged the same harm as N. which would arise out of the lack of medical services in case of deportation to a home country. However, as we know, D. succeeded in his application, despite the principle proclaimed by the Court in *N. v UK* where it found no violation of Article 3. Another interesting issue was pointed out by the Court in this case:

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[567] In *Cossey v United Kingdom* (n 192), the Plenary Court stated that 'it is not bound by its previous judgments' but that it 'usually follows and applies it precedents, such a course being in the interests of legal certainty and the orderly development of the Convention case-law.' However, the Court continued, it is free to depart from an earlier judgment if there are 'cogent reasons' for doing so, which might include the need to 'ensure that the interpretation of the Convention reflects societal changes and remains in line with present day conditions'." Harris, O'Boyle and Warbrick (n 25), 18.

[568] *N. v United Kingdom* (2008) 47 E.H.R.R. 39.

[569] Ibid [43].

"Although many of the rights it contains have implications of a social or economic nature, the Convention is essentially directed at the protection of civil and political rights. Furthermore, inherent in the whole of the Convention is a search for a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights. Advances in medical science, together with social and economic differences between countries, entail that the level of treatment available in the contracting state and the country of origin may vary considerably. While it is necessary, given the fundamental importance of Art.3 in the Convention system, for the Court to retain a degree of flexibility to prevent expulsion in very exceptional cases, Art.3 does not place an obligation on the contracting state to alleviate such disparities through the provision of free and unlimited health care to all aliens without a right to stay within its jurisdiction. A finding to the contrary would place too great a burden on the contracting states."

The Court stressed that there are significant social and economic differences between countries and that even though Article 3 is of fundamental importance, putting an obligation to the state to provide free and unlimited healthcare to all aliens would place too great burden on the states. The Court's concern regarding the financial burden that will be placed on states is clearly expressed. This wording is coming from the same Court that considered detention conditions and Article 3, stating:

"…when considering the material conditions in which the applicant was detained and the activities offered to him, that Ukraine encountered serious socio-economic problems in the course of its systemic transition and that prior to the summer of 1998 the prison authorities were both struggling under difficult economic conditions and occupied with the implementation of new national legislation and related regulations. However, the Court observes that lack of resources cannot in principle justify prison conditions which are so poor as to reach the threshold of treatment contrary to Article 3 of the Convention. Moreover, the economic problems faced by Ukraine cannot in any event explain or excuse the particular conditions of detention which it has found in paragraph 145 to be unacceptable in the present case."[570]

Both of the two quoted cases have strong economic and social elements and if the Court finds a violation of Article 3 it places a strong financial burden on the state. Even more, one might expect that there are and will be fewer aliens looking for protection of their health from the state than detainees requiring detention conditions and healthcare in prisons of a certain standard. So, why did the Court decide to continue in its findings of violation of Article 3 based on poor detention conditions but when it came to the right to healthcare of aliens it decided to stop after one judgment? One can only speculate. Maybe, with the right to healthcare for aliens the Court became worried about

[570] *Poltoratskiy v Ukraine* (n 343) [148].

the consequences of those judgments in terms of heightening expectations to provide the right to a healthcare in general, i.e. to the population in general. Maybe the fact that the victims in these cases are foreigners and not citizens of the respondent State also had influence on the Court. Also, with the detention conditions the Court was and still is very much influenced by the work of the CPT and the CPT findings are of great help to the Court when deciding whether a violation occurred. In the deportation cases there is also a difficulty in assessing standards of healthcare in non-European states which might be another reason for the Court's reluctance. As said, one can only speculate.

But, what we might conclude is that the doctrine of the indivisibility of civil and political and economic and social rights has been used by the Court on a somewhat discretionary basis. The Court has in the cases concerning detention conditions and healthcare in prisons as well as in the cases concerning the right to a healthy environment decided to very much rely on the living instrument and the dynamic interpretation doctrines, while in the issue of healthcare in general it has been much more cautious and allowed to states a wide margin of appreciation which, together with the need to ration scarce resources, has been used as an explanation for its reluctance.

Now, the right to protection of health as interpreted by the ESCR under the ESC will be presented. This is to show that despite the notion of indivisibility which is strongly supported in theory, the practice shows us that the protection of economic and social rights is still better when left to the ESC organs then to the ECHR ones.

6.7 EUROPEAN SOCIAL CHARTER AND THE RIGHT TO THE PROTECTION OF HEALTH

Article 11 of the Revised ESC states:

With a view to ensuring the effective exercise of the right to protection of health, the Parties undertake, either directly or in cooperation with public or private organisations, to take appropriate measures designed *inter alia:*

1. to remove as far as possible the causes of ill-health;
2. to provide advisory and educational facilities for the promotion of health and the encouragement of individual responsibility in matters of health;

3. to prevent as far as possible epidemic, endemic and other diseases, as well as accidents.[571]

In chapter V the Information document prepared by the secretariat of the ESC in March 2009 on health promotion and prevention regarding the right to a healthy environment was presented. In this document numerous issues relating to public health as protected under Article 11, such as food safety, vaccination programmes and alcoholism are also analysed. Also, it makes reference to the other ESC articles related to the right to health, namely, Article 3 which concerns health and safety at work; Articles 7 and 17 which concern the health and wellbeing of children and young persons; Articles 8 and 17 which concern the health of pregnant women and Article 23 which deals with the health of elderly persons.[572]

As to the healthcare issues the Information document states:

"The system of health care must be accessible to the entire population. To that end, states should take as their main criterion for judging the success of health system reforms effective access to health care for all, without discrimination, as a basic human right.

The right to access to health care implies:

- that the cost of health care should be borne, at least in part, by the community as a whole;

- that health costs should not place an excessive financial burden on individuals. Steps must therefore be taken to reduce the financial burden on patients from the most disadvantaged sections of the population;

- that arrangements for such access must not lead to unnecessary delays in its provision. Access to treatment should notably be based on transparent criteria, agreed at national level, that address the risk of deterioration both in clinical and quality of life terms;

– the number of health care professionals and equipment must be adequate (the criterion is 3 beds per thousand population)."[573]

The document itself is intended to be used as guidance for State parties as it points out what is expected from states under the Charter provisions that deal with the right to healthcare. The Information document is based on the conclusions adopted by the ECSR through its Reporting system over the years and it might be said to represent a summary of the ECSR conclusions in the healthcare issues.

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[571] In the Original ESC there is no mention of accidents.
[572] The right to health and the European Social Charter (n 499).
[573] Ibid, 10-11.

The ECSR interpreted and made observations regarding Article 11 not only in its conclusions but also through its decisions in the Collective Complaints procedure. Both the ECSR conclusions and decisions concerning the right to health will now be discussed.

6.8 THE REPORTING PROCEDURE AND ARTICLE 11 OF THE ESC

Under the Reporting procedure every year States parties submit a report indicating how they implement the Charter in law and in practice. Each report concerns some of the accepted provisions of the Charter. The provisions are divided into four thematic groups and each provision of the Charter is reported on once every four years. As to the Article 11 of the ESC it is a 'non-core' right, but all the states that have accepted it are under the ECSR authority regarding obligations as set out under Article 11. Some conclusions adopted by the ECSR regarding the right to health will now be presented.

In the introduction to its Conclusions XVII- 2 from 2005 (Volume 1) the ECSR made the following general observation regarding Article 11 of the (Original) Charter:

"The Committee notes that the right to protection of health guaranteed in Article 11 of the Charter complements Articles 2 and 3 of the European Convention on Human Rights - as interpreted by the European Court of Human Rights - by imposing a range of positive obligations designed to secure its effective exercise. This normative partnership between the two instruments is underscored by the Committee's emphasis on human dignity. In Collective Complaint FIDH v. France (No. 14/2003) it stated that "human dignity is the fundamental value and indeed the core of positive European human rights law – whether under the European Social Charter or under the European Convention of Human Rights and [that] health care is a prerequisite for the preservation of human dignity.

In assessing whether the right to protection of health can be effectively exercised, the Committee pays particular attention to the situation of disadvantaged and vulnerable groups. Hence, it considers that any restrictions on this right must not be interpreted in such a way as to impede the effective exercise by these groups of the right to protection of health.

…

The Committee notes that this approach calls for an exacting interpretation of the way the personal scope of the Charter is applied in conjunction with Article 11 on the right to protection of health, particularly with its first paragraph on access to health care. In this respect, it recalls that it clarified the application of

the Charter's personal scope in its general introduction to Conclusions XVII-1 and 2004 (pp. 9-10; see also the general introduction to Conclusions XVI-1 and 2002).

…

Finally, the management of waiting lists and waiting times in health care, which the Committee examines by paying particular attention to the issues of discrimination and emergency situations and in the light of the Council of Europe Committee of Ministers Recommendation No. R (99) 21 on criteria for the management for waiting lists and waiting times in health care, and health education in schools are crucial for assessing the conformity of national situations with Articles 11§1 and 11§2 respectively."[574]

As we have seen, the Court similarly made statements on the necessity of having a healthcare system available to everyone without discrimination; however, the ECSR expressed this obligation with additional explanations and more clarity.

In assessing the state's compliance with Article 11(1) in Conclusions from 2009 concerning Articles 3 and 11 of the Revised Charter in respect of Albania, the ECSR found Albania to be in non-conformity. The ECSR pointed out regarding general indicators of the state of health of the population: "To comply with Article 11(1), the main indicators of a country's state of health must reflect an improvement and not be too significantly below the average for all European countries."[575] It also paid close attention to life expectancy and the principal causes of death, infant and maternal mortality and the healthcare system (access to healthcare, healthcare professionals and facilities).[576]

Regarding Article 11(2) the same ECSR Conclusions will be looked at, but on Belgium.[577] The ECSR examined various spheres of Article 11(2) on advisory and educational facilities, such as encouraging individual responsibility through public information and awareness-raising, health education in schools; counselling and screening to the population in general and then specifically pregnant women, children and young people. On Belgium the ECSR decided to defer its conclusion until receiving the information requested on the above mentioned issues.

We can look at two more conclusions on Hungary and Iceland. Conclusions XIX-2 on Article 11(1) concerning the situation in Hungary are on the right to protection of

[574] ECSR Conclusions XVII- 2, Volume 1 (n 104), 10-11.
[575] ECSR Conclusions 2009- Volume 1 (n 519), 27.
[576] Ibid, 27-30.
[577] Ibid, 123-125.

health on the removal of the causes of ill-health. On the issue of life expectancy and principal causes of death the ECSR considered it has not been established that measures taken to reduce the mortality rate are adequate. Therefore it did not find the situation in Hungary in conformity with Article 11(1) of the Charter. On the issues of infant and maternal mortality as well as access to healthcare Hungary is placed among the average for European countries. Finally, on healthcare professional and facilities the ECSR concluded that the situation in Hungary is not in conformity with Article 11(1) of the Charter because there is nothing in the report to show that sufficient measures have been taken to reduce the mortality rate.[578] On the same issues and in the same Conclusions, Iceland was found to be in conformity with Article 11(1) since the life expectancy is above the European average,[579] infant mortality dropped and maternal mortality was zero during the reference period. As for the issue of access to healthcare and healthcare professional and facilities the ECSR also found Iceland to be in conformity with the Charter.[580]

Therefore, the ECSR has developed a general approach in assessing the compliance of states with the right to health as well as the particular interpretation of each paragraph of Article 11. It started its interpretation in its first cycle of conclusions on Article 11 and up to July 2012 the ECSR has assessed numerous national reports and set out standards in providing the right to health as required under Article 11 of the Charter. In its 2009 Conclusions on Article 11(1) and 11(2) of the Revised Charter, the ECSR found ten out of twenty three states that have accepted Article 11(1) to be in conformity with it, while regarding Article 11(2) it found eleven out of twenty three states that have accepted it to be in conformity.[581] In the 2009 Conclusions but on the Original Charter the ECSR found nine out of fifteen states that have accepted Article 11(1) to be in conformity with it, while regarding Article 11(2) it found eight out of fifteen states to be in conformity. [582] Generally, the conclusions are very detailed and the ECSR analyses

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[578] ECSR, Conclusions XIX-2 (2009) (n 520), 247-249.

[579] In 2006 it was 79 years for males and 83 years for females compared to an EU average (2004) of 75.2 years for males and 81.5 years for females.

[580] ECSR Conclusions XIX-2 (2009) (n 520), 272-273.

[581] States that are found to be in conformity with Article 11(1) of the Revised ESC are: Belgium, Estonia, Finland, France, Ireland, Netherlands, Norway, Portugal, Slovenia and Sweden. States that are found to be in conformity with the Article 11(2) of the Revised ESC are: Andorra, Bulgaria, Cyprus, Finland, France, Ireland, Italy, Netherlands, Norway, Slovenia and Sweden. See ECSR Conclusions 2009- Volume 1 (n 518), 16.

[582] States that are found to be in conformity with Article 11(1) of the Original ESC are: Austria, Croatia, Czech Republic, Denmark, Germany, Iceland, Luxemburg, The Former Yugoslavian Republic of Macedonia and United Kingdom. States that are found to be in conformity with Article 11(2) of the

every aspect of the right to health in accordance with its interpretation of every paragraph.

As with the reports on the right to a healthy environment, one of the problems in the Reporting system is the amount of information the ECSR requires from states in order for it to reach a conclusion whether the state is in conformity or in non-conformity with Article 11(1) and Article 11(2) requirements. For that reasons, it on several occasions decided to defer its conclusion, for example in 2009 Conclusions on the Revised Charter it decided to defer its conclusions on Article 11(1) regarding three states while on Article 11(2) regarding six states.[583] As to the Original Charter's Articles 11(1) in 2009 it deferred its conclusions on Greece, Poland and Spain, while regarding Article 11(2) it did so on Croatia, Greece, Hungary, Spain and "The former Yugoslav Republic of Macedonia".[584] Again it is evident that the more information the ECSR requires State parties to provide for it to be able to make a judgment about their compliance, the more difficult it becomes for it to make a definite judgment about compliance.

Unfortunately, again just like with Article 11(3) concerning the right to a healthy environment, the biggest defect within the Reporting system is the CoM follow up procedure, or the lack thereof. Despite very detailed ECSR conclusions on the healthcare rights, the CoM has to date only issued two recommendations, both concerning Turkey.[585] Not only does the CoM rarely issue recommendations, but even the adopted recommendations are very mild and brief. It only stated that it recommends that the Government of Turkey takes account, in an appropriate manner, of the negative conclusions and requested information from Turkey in its next report on the measures it has taken to this effect.[586]

Original ESC are: Austria, Czech Republic, Denmark, Germany, Iceland, Luxemburg, Poland and United Kingdom. See ECSR Conclusions XIX-2 (2009) (n 520), 16.

583 The ECSR decided to defer its conclusions on Article 11(1) of the Revised ESC on: Andorra, Cyprus and Ukraine whiled regarding Article 11(2) of the Revised ESC it decided to defer its conclusions on: Azerbaijan, Belgium, Estonia, Lithuania, Portugal and Ukraine. See ECSR Conclusions 2009- Volume 1 (n 518), 16.

584 ECSR Conclusions XIX-2 (2009) (n 520), 16.

585 Recommendation no. R ChS (98) 4 on the application of the European Social Charter by Turkey (n 266); and Recommendation no. R ChS (2002) 1 on the application of the European Social Charter by Turkey during the year 1995-1998 (15th supervision cycle, part II) on Article 11-1 of the Original ESC.

586 Ibid.

6.9 COLLECTIVE COMPLAINTS ON THE RIGHT TO HEALTHCARE

The ECSR has up to May 2012 dealt with eight collective complaints and delivered four decisions on the merits.[587] Since the *Marangopoulos* complaint was discussed in the previous chapter it will not be discussed again in this chapter. Giving an in-depth analysis of all collective complaints on the right to health is not relevant for this thesis, since the main point, to show how the ECSR operates and deals with the claims of violation, can be shown without discussing all the complaints. The complaint discussed here will be *ERRC v Bulgaria*[588] as it consists of the best and most comprehensive presentation of the ECSR approach towards the right to health. But first two other cases will be discussed briefly.

In the *International Centre for the Legal Protection of Human Rights (INTERIGHTS) v Croatia*[589] INTERIGHTS alleged that Croatia is not in conformity with Articles 11(2), and 16 taken alone and in the light of the non-discrimination clause in the Preamble; nor with Article 17 of the ESC, because Croatian schools do not provide comprehensive or adequate sexual and reproductive health education for children and young people. Since education materials used in Croatian school contained some discriminatory statements the ECSR held that such statements contained in educational material used in the ordinary curriculum constitutes a violation of Article 11(2) in light of the non-discrimination clause.[590]

As to the complaint brought to the ECSR by the *Confédération Générale du Travail (CGT) v France*, the CGT asked the ECSR to rule that the provisions of Act No. 2003-47 of 17 January 2003 on wages, working time and employment development, referred to as "Fillon II", and specifically those of Article 2 A. II, III and VIII and of Article 3, fail to comply with Articles 2(1) and (5), 3(1) and 11(1) and (3) of the Revised Charter. However, the ECSR in this case did not pay particular attention to Article 11 of the Charter since the CGT did not claim a sole violation of Article 11 but only in

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[587] *Confédération générale du travail (CGT) v France* (22/2003), (decision on the merits of 7 December 2004); *Marangopoulos Foundation for Human Rights (MFHR) v Greece* (n 103); *International Centre for the Legal Protection of Human Rights (INTERIGHTS) v Croatia* (45/2007), (2009) 49 E.H.R.R. SE13; *ERRC v Bulgaria* (46/2007), (2009) 49 E.H.R.R. SE2*; Defence for Children International (DCI) v the Netherlands* (47/2008), (2010) 51 E.H.R.R. SE14; *Medecins du Monde- International v France* (67/2011), decision on admissibility of 13 September 2011; *Defence for Children International (DCI) v Belgium* (69/2011), decision on admissibility of 7 December 2011; *International Federation of Human Rights (FIDH) v Greece* (n 501).

[588] *ERRC v Bulgaria* (n 587).

[589] *International Centre for the Legal Protection of Human Rights (INTERIGHTS) v Croatia* (n 587).

[590] Ibid [43]-[66].

conjunction with Article 2(1) and (5). The ECSR in its conclusions only found violation of Article 2(1).

The *ERRC v Bulgaria* case concerns the rights of Roma to healthcare, health insurance, exemption of payment of healthcare contributions for persons receiving social assistance, the living environment of Roma, access of Roma to healthcare services and measures to address health problems of Roma in Bulgaria. In this case, the ERRC claimed violations of Article 11, Article 13 and of Article E on non-discrimination, while the Government considered that the relevant legislation guaranteed equal access to health insurance for all citizens and that it had taken sufficient positive measures for the improvement of the health status of the Roma.

The right to healthcare in Bulgaria is based on a system of compulsory health insurance through the collection of healthcare contributions. Persons who perform their obligations related to the payment of health contributions have access to medical care and a whole range of medical services. There is, however, a patient participation fee for each visit to a physician or each day of hospital treatment. Coverage under the contributory healthcare scheme is possible on a "non-contributory" basis for certain categories of socially vulnerable persons, namely persons entitled to social assistance, targeted assistance for heating or unemployment benefits, who are exempted from paying healthcare contributions, and can also obtain an exemption or reduction of the patient participation fee. Finally, there is a health scheme funded by taxes which provides benefits in kind, other than those provided by the contributions funded scheme, to all residents irrespective of their health insurance status. This ensures medical aid in emergency cases and another range of minimum medical services.[591]

In its assessment of the parties' submissions regarding the alleged legal restrictions on access to health insurance and medical assistance for socially vulnerable individuals, the alleged systemic barriers for the effective exercise of the right to health protection and the alleged discrimination against Roma in the provision of medical services, the ECSR concluded as follows. In respect of ERRC's complaint that healthcare legislation excludes Roma from access to healthcare, the ECSR considered that none of the relevant statutory provisions examined can be deemed to be discriminatory on the grounds of ethnicity. The ECSR considered that a health insurance system based on the

[591] *ERRC v Bulgaria* (n 587) [18].

collection of healthcare contributions, as is the case in Bulgaria, met the requirements of the Revised Charter, given that there also existed a subsidiary "non-contributory" system, open to persons who did not benefit from the contributory system and which ensured them sufficient coverage, not only in situations of emergency or a threat to life.[592] Furthermore, the ECSR observed that exemption from paying healthcare contributions for persons receiving social assistance, targeted assistance for heating or unemployment benefits – who are entitled to state-subsidised health insurance - ensured that some of the most disadvantaged sections of the community had access to healthcare.[593] However, regarding the situation of persons who did not qualify for social assistance or who had temporarily lost the right to social assistance, the ECSR noted that such persons were left without health coverage during the period that social assistance was interrupted, given that the Health Insurance Act links eligibility for "non-contributory" state health coverage to being a recipient of social assistance benefits.

The main issue was for the ECSR to assess what medical services were available to persons who had lost social insurance and who required medical care, namely the access of Roma to healthcare services.[594]

The ECSR concluded:

"The Committee recalls that Article 11 of the Charter imposes a range of positive obligations to ensure an effective exercise of the right to health, and the Committee assesses compliance with this provision paying particular attention to the situation of disadvantaged and vulnerable groups (Conclusions XVII-2 – General Introduction).

…

The Committee considers there is sufficient evidence which shows that Roma communities do not live in healthy environments. This situation can in part be attributed to the failure of prevention policies by the State, for instance the lack of protective measures to guarantee clean water in Romani neighbourhoods, as well as the inadequacy of measures to ensure public health standards in housing in such neighbourhoods (see European Roma Rights Centre v. Bulgaria, Complaint No. 31/2005, decision on the merits of 18 October 2006)… In connection with the measures taken by the authorities as regards health education, health counselling and screening for the Roma population, the Committee notes that some programmes recently put in place – such as the establishment of health mediators - may have a positive impact on

592 Ibid [40] and [41].
593 Ibid [42].
594 Ibid [43].

improving Roma access to health care. However, it considers that there has been a lack of systematic, long-term government measures to promote health awareness.

The Committee also notes from various studies referred to by the ERRC in the complaint that the health status of Roma is inferior to that of the general population. The Government acknowledges in its submissions that the health condition of Roma is poor, and refers to the adoption of a "Health Strategy Concerning People in Disadvantaged Position Belonging to Ethnic Minorities" with a view to improving their health condition. The Committee nevertheless considers that the State has failed to meet its positive obligations to ensure that Roma enjoy an adequate access to health care, in particular by failing to take reasonable steps to address the specific problems faced by Roma communities stemming from their often unhealthy living conditions and difficult access to health services.

…

The Committee therefore holds that the failure of the authorities to take appropriate measures to address the exclusion, marginalisation and environmental hazards which Romani communities are exposed to in Bulgaria, as well as the problems encountered by many Roma in accessing health care services, constitute a breach of Article 11§ 1, 2 and 3 of the Revised Charter in conjunction with Article E."[595]

As we can see, the ECSR found a violation of all Article 11 paragraphs together with Article E of the ESC. It emphasized that Article 11 imposes a range of positive obligations and that regarding the Roma community in Bulgaria the national authorities had not complied with the requirements set out in Articles 11 and E of the ESC. The ECSR analysed the situation in detail together with all the particularities concerning the Roma population in comparison to the population in general.

Following the ECSR's decision, the CoM adopted a Resolution in which it, on the basis of information provided by the Permanent Representative of Bulgaria, it welcomed the measures already taken by the Bulgarian authorities to bring the situation into conformity with the standards of the Charter regarding the provision of healthcare to all persons who might need it, irrespective of their origin or social condition, and stated that it looks forward to Bulgaria reporting that, at the time of the submission of the next report concerning the relevant provisions of the ESC, the situation has been brought into full conformity.[596]

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[595] Ibid [45]-[51].

[596] Resolution CM/ResChS(2010)1 on the Collective complaint No. 46/2007 by the European Roma Rights Centre (ERRC) against Bulgaria, Adopted by the Committee of Ministers on 31 March 2010 at the 1081st meeting of the Ministers' Deputies.

Therefore, the situation in Bulgaria has improved from December 2008, when the decision on the merits was adopted, to March 2010 when the CoM adopted its Resolution. If we compare this with the time it takes for the Court's judgments to be executed it does not seem as if the ESC is a less effective mechanism for human rights protection then the ECHR. I am not trying here to reach a final conclusion based on one single collective complaint; however, through the years of the Reporting system and after looking at the Convention system in healthcare issues, it looks as if within the CoE healthcare issues should be left to the ESC mechanism and bodies to deal with, especially nowadays when the Collective Complaint system is gaining in importance and the number of collective complaints is increasing.

Again, the CoM is rather bland in its Resolution and it took almost two years for it to adopt a Resolution. Unfortunately, the pressure it puts on states through the Convention system is also mild and with the same time distance. Therefore, the fact that the Court delivered a judgment will not make a difference in terms of the CoM political pressure on states.

6.10 CONCLUSION

The reason for giving an in-depth analysis of the *ERRC v Bulgaria* is that it provided us with the claims of violations of all aspects of the right to health as guaranteed under Article 11. By looking at this decision on the merits we can see the ECSR working methods when deciding whether a violation of Article 11 occurred within the Collective Complaints system. The way the ECSR deals with the heathcare complaints is, in my opinion, another argument against the Court's involvement in protection of economic and social rights, that is, in rights with significant socio-economic elements. Even more importantly, the execution of the ECSR decisions and of the Court judgments dealing with the rights with significant socio-economic elements is quite similar. Although the Court has not dealt with the right to health, at least not as much as with the right to a healthy environment and with the right to healthcare in detention, it gave indications it might start doing so in the future. But, what I have also tried to show is that although the Collective Complaints system is relatively new (especially in comparison to the Court's judgment system) it is making important progress and the awareness of possible claimants of protection provided by the ESC system is rising. The standards of

healthcare required under Article 11 have been set by the ECSR under the Reporting procedure and now, with the Collective Complaints procedure, those standards have reached a more obligatory level, despite the non-binding character of the ECSR decisions. Also, the Court has shown inconsistency in deciding cases concerning the right to health in all its aspects with no clear guidelines and standards. On the other hand, the ECSR has made clear its expectations and state obligations regarding the right to health in its conclusions and is also stressing them through its collective complaints decisions.

Again, the biggest deficiencies of the ESC system in general are the small number of states that have ratified the Collective Complaints Protocol and the lack of the CoM follow-up where it should address appropriate recommendations to states found by the ECSR to be in non-compliance. One must not ignore those problematic issues. However, instead of looking for a solution for those problems within the ECHR system, the CoE bodies should focus into improving the ESC system and urge states to ratify the Collective Complaints Protocol as well as pressure the CoM to issue proper and concrete recommendations. Therefore, the right to health and healthcare issues should be left for the ESC mechanisms of protection to deal with.

CHAPTER VII

THE RIGHT TO ADEQUATE HOUSING

7.1 INTRODUCTION

This chapter will look at the right to adequate housing, as interpreted and understood under the ECHR and ESC. Again, the main focus will be on whether the Convention system is suitable for dealing with rights that consist of numerous socio-economic elements, such as the right to adequate housing. Just as with the right to healthcare, we will see the Court's reluctance in recognizing the right to adequate housing under the Convention. Nevertheless, again the Court has given some indications it might enter this sphere.

In this chapter the right to adequate housing as protected under the Convention's Article 8 will first be discussed. Therefore, the jurisprudence under Article 8 will be analysed to see the Court's approach when it comes to guaranteeing the right to adequate housing. The Court's jurisprudence will be divided in three groups of cases.[597] Within the first group, cases where state agents were directly involved in the destruction of and eviction from homes will be presented. Secondly, cases where actions of state bodies caused individuals to either lose or to move from their homes will be discussed. Finally, in the third group of cases, applications primarily concerned with the content of the state positive obligations regarding adequate housing will be analysed. As will be seen, when it comes to the first group of cases, the Court has been rather clear in setting out states' obligations. As to the second group of cases, it has shown a certain inconsistency while it has shown most reluctance in placing positive obligations on states under the third group of cases.

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[597] For a similar, albeit not the same, division see Clements and Simmons (n 546). See also Padriac Kenna, 'Housing rights: positive duties and enforceable rights at the European Court of Human Rights' (2008) 2 E.H.R.L.R. 193; Koch, *Human Rights as Indivisible Rights…* (n 2) Chapter 6; David Hughes and Martin Davis, 'Human rights and the triumph of property: the marginalisation of the European Convention on Human Rights in housing law' (2006) Nov/Dec CONVPL 526; Ellie Palmer, 'Beyond arbitrary interference: the right to a home? Developing socio-economic duties in the European Convention on Human Rights' (2010) 61(3) N.I.L.Q. 225; Nic Madge, 'Housing and human rights: lessons from Strasbourg: Part 4' (2008) 11(3) J.H.L. 47; and Nic Madge, 'Housing and human rights: lessons from Strasbourg: Part 5' (2008) 11(5) J.H.L. 89.

Furthermore, the right to housing as guaranteed under the ESC will be analysed and it will be argued that it would provide a better alternative than seeking to protect the right to adequate housing through the ECHR. The right to housing is protected under three provisions of the ESC.[598] All in all, those provisions guarantee: access to adequate and affordable housing; reduction of homelessness; housing policy targeted at all disadvantaged categories; procedures to limit forced eviction; equal access for non-nationals to social housing and housing benefits; and housing construction and housing benefits related to family needs.[599] As will be detailed later in the chapter, there were numerous reports under the ESC on the right to housing. Even more importantly, there have also been numerous collective complaints, and most of them concerned a violation of Article 31, but there were also complaints regarding Article 16 and Article 23. Attention will be given to both the Reporting and to the Collective Complaints system to show that the ESC system is more suitable for protection of the right to adequate housing.

7.2 THE RIGHT TO ADEQUATE HOUSING AND THE ECHR

Within the ECHR there is no right to adequate housing as such. However, from the concept of a right to respect for the home and the right to private life under Article 8, the idea of the right to adequate housing, at least certain aspects of it, has begun to emerge.[600]

In general, according to the Court, home (which is an autonomous concept within the meaning of Article 8(1)) "will usually be the place, the physically defined area, where private and family life develops."[601] The Court has also stated that home can include an intended place to live[602] and that the notion of home can also cover business premises.[603]

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598 Articles 31 and 23 of the Revised ESC and Article 16 of both Revised and Original ESC (n 5).
599 CoE, European Social Charter, About the Charter, <http://www.coe.int/t/dghl/monitoring/socialcharter/Presentation/AboutCharter_en.asp> accessed 17 July 2012.
600 See Antoine Buyse, 'Strings attached: the concept of "home" in the case law of the European Court of Human Rights' (2006) 3 E.H.R.L.R 294.
601 *Giacomelli v Italy* (n 455) [76].
602 *Gillow v United Kingdom* (1991) 13 E.H.R.R. 5930 [46].
603 *Niemietz v Germany* (1993) 16 E.H.R.R. 97: "As regards the word 'home', appearing in the English text of Article 8, the Court observes that in certain Contracting States, notably Germany, it has been accepted as extending to business premises. Such an interpretation is, moreover, fully consonant with the French text, since the word 'domicile' has a broader connotation than the word 'home' and may extend, for

It is difficult to separate rights respecting the home in a physical sense from those associated with family life, since a protected private space is essential to the activities which constitute family life.[604] After some premises have been established as home, then the first protection is of a right of access and occupation, and a right not to be expelled or evicted from them (*Cyprus v Turkey*).[605]

The interference with respect for one's home may come in the first instance from private parties, but the state's responsibility will be engaged if the state fails to address a continuing interference. Despite the positive developments in the right to respect for the home under Article 8, the Court has stressed that there is no right to be provided with a home and how such claims fall outside the scope of Article 8.[606] Consequently, there is no right to enjoy a home of particular standard. However, as will be seen later, in *Marzari v Italy*, where the applicant with severe disability was allocated in an inadequate apartment, the Court stated that although Article 8 does not guarantee the right to have one's housing problem solved by the authorities, a refusal of the authorities to provide assistance in this respect to an individual suffering from a severe disease might in certain circumstances raise an issue under Article 8.[607]

As already stated, under the Convention home has an autonomous meaning and whether or not some habitation constitutes a home will depend on the actual circumstances of the case. For example, in the *Connors* case (that will be discussed later in the chapter), the Court emphasised that Article 8 "concerns rights of central importance to the individual's identity, self-determination, physical and moral integrity, maintenance of relationships and a settled and secure place in the community."[608] In one of the leading cases concerning the concept of home, *Gillow v United Kingdom,* the UK Government had first (before the Commission) argued that the applicants had been absent from their house for so long that it was no longer their home within the meaning

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example, to a professional person's office. In this context also, it may not always be possible to draw precise distinctions, since activities which are related to a profession or business may well be conducted from a person's private residence and activities which are not so related may well be carried on in an office or commercial premises. A narrow interpretation of the words 'home' and '*domicile*' could therefore give rise to the same risk of inequality of treatment as a narrow interpretation of the notion of 'private life.'" [30].

[604] Janis, Kay and Bradley (n 26) 403.

[605] Harris, O'Boyle and Warbrick (n 25), 377; *Cyprus v Turkey* (n 544).

[606] *Chapman v United Kingdom* (n 11) [99].

[607] *Marzari v Italy* (1999) 28 EHRR CD 175 [179].

[608] *Connors v United Kingdom* (2005) 40 E.H.R.R. 9 [82].

of Article 8(1).[609] However, the Commission (and later the Court) decided that although the applicants had been absent from Guernsey for almost nineteen years, they had in the circumstances retained sufficient continuing links with Whiteknights for it to be considered their home, for the purposes of Article 8 and that, taking account of the applicants' continuing connection with the property, their return to Whiteknights was a return to their home within the meaning of Article 8.[610] Furthermore, the Court has emphasized that for the establishment of a home under Article 8 there is no requirement of legality. It noted that whether a property is to be classified as a home is a question of fact and does not depend on the lawfulness of the occupation under domestic law.[611]

When it comes to adequate housing, many cases involving a claimed right to adequate housing will fall to be considered not only under the right to respect for the home, but also under the right to respect for private life of Article 8 as well as under Article 1 of Protocol 1 which guarantees the right to property. When it comes to private life under Article 8, it is a broad concept and the Court itself stated:

"Private life is a broad term not susceptible to exhaustive definition. The Court has already held that elements such as gender identification, name, sexual orientation and sexual life are important elements of the personal sphere protected by Article 8. That Article also protects a right to identity and personal development, and the right to establish and develop relationships with other human beings and the outside world and it may include activities of a professional or business nature. There is, therefore, a zone of interaction of a person with others, even in a public context, which may fall within the scope of "private life"."[612]

Of course, some guidance regarding the scope and meaning of the right to private life can be found in the Court's case-law, but it is exactly because of its broadness that the applicants in certain circumstances have invoked only the violation of their private life and not the violation of their right to respect for home when it came to housing issues. Even the applicants who were never in a possession of a home may therefore seek to claim the right to adequate housing before the Court and not only the applicants whose homes have been in some way interfered with. It is the cases where the right to adequate

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609 *Gillow v United Kingdom* (1983) 5 E.H.R.R. CD581 [2].
610 *Gillow v United Kingdom* (1985) 7 E.H.R.R. CD2920 [119] and *Gillow v United Kingdom* (1989) 11 E.H.R.R. 335 [46].
611 *Buckley v United Kingdom* (1997) 23 E.H.R.R. 101; *Connors v United Kingdom* (n 606); and *McCann v United Kingdom* (n 123).
612 *Peck v United Kingdom* (2003) 36 E.H.R.R. 41 [57].

housing has been invoked under the right to private life that are most challenging for the Court.

The cases where Article 1 of Protocol 1 has been invoked without reference to Article 8 will not be discussed here, since the interest of this chapter are not the property rights but the right to adequate housing within the context of private life, family life and home as a civil and political right. The main obligations under Article 8 are those of negative character, meaning that the state must not interfere with one's right of access and occupation of a home as well as not to expel or evict a person from its home. However, besides those negative obligations, as with many of the Convention rights, certain positive duties have emerged through the years.

As already stated, cases analysed here under the Article 8 right to adequate housing will be divided into three groups. The Court's incoherent approach regarding the right to adequate housing and what obligations it imposes will be discussed now.

7.3 CASE-LAW OF THE COURT ON THE RIGHT TO ADEQUATE HOUSING

7.3.1 THE FIRST GROUP OF CASES

The first group consists of cases where the state agents were directly involved in the destruction of and eviction from the home. Here the Court was least reluctant in finding a violation of Article 8 and placing an obligation on the state to solve the applicants' homelessness problems. One of the leading cases concerning this issue is the *Moldovan and others v Romania (no.2)*[613] or so called *Hadareni* case. The case originally involved 25 applicants, of whom 18 had agreed to a friendly settlement of their case (case *Moldovan and others v Romania (no. 1),* delivered on 5 July 2005). However, the facts of those cases are the same so here they will be presented jointly.

In September 1993 a row broke out between three Roma men and a non-Roma villager in Hadareni that led to the villager's son, who had tried to intervene, being stabbed in

[613] *Moldovan and others v Romania (no.2)* (2007) 44 E.H.R.R. 16.

the chest by one of the Roma men. The three Roma men fled to a nearby house, but a crowd gathered outside, including the local police commander and several officers, and set the house on fire. Two Roma men managed to escape from the house, but were pursued by the crowd and beaten to death, while the third one was prevented from leaving the building and burnt to death. By the following day, 13 Roma houses had been completely destroyed including the homes of all the applicants. When they tried to return to their homes, they alleged that rocks were thrown at them and that they were beaten by police officers. The Roma residents of Hadareni lodged a criminal complaint against those allegedly responsible, including six police officers. In September 1995, all charges against the police officers were dropped. The proceedings were first led in front of the domestic courts that concluded that "the Roma community has marginalised itself, shown aggressive behaviour and deliberately denied and violated the legal norms acknowledged by society. Most of the Roma have no occupation and earn their living by doing odd jobs, stealing and engaging in all kinds of illicit activities."[614] The punishments imposed on the villagers were extremely mild.

The Romanian Government subsequently allocated funds for the reconstruction of the damaged or destroyed houses. Eight were reconstructed, though the applicants submitted photographs showing that those houses were uninhabitable, with large gaps between the windows and the walls and incomplete roofs. Other houses had either not yet been rebuilt or had been rebuilt, but remained unfinished. The applicants complained to the Court that, following the destruction of their houses, they could not live in their homes and had to live in very poor, cramped conditions. The Court found a violation of Articles 3, 6(1), 14 and 8.

To the claims of an Article 8 violation the Court first stressed some general principles regarding the positive obligations of the state and that regard also must be given to the subsequent behaviour of the state.[615] It went on to stress that its task is to determine whether the national authorities took adequate steps to put a stop to breaches of the applicants' rights. In the Court's view, all the elements taken together disclose a general attitude of the authorities – prosecutors, criminal and civil courts, Government and local authorities – which perpetuated the applicants' feelings of insecurity after June 1994 and constituted in itself a hindrance of the applicants' rights to respect for their private and

[614] Ibid [44].
[615] Ibid [93]-[97].

family life and their homes. An important aspect was also that most of the applicants had not to date returned to their village, and lived scattered throughout Romania and Europe. The Court concluded that the above hindrance and the repeated failure of the authorities to put a stop to breaches of the applicants' rights amounted to a serious violation of Article 8 of a continuing nature.[616] The Court also noted that the attacks were directed against the applicants because of their Roma origin and the applicants' Roma ethnicity appeared to have been decisive for the length and the result of the domestic proceedings. The Court took note of the repeated discriminatory remarks made by the authorities throughout the case and concluded accordingly that there has been a violation of Article 14 taken in conjunction with Articles 6 and 8.

The Court looked at all the circumstances of the case together and found the State responsible for the applicants' homelessness. It also found that the State had caused the problems applicants were facing later on, particularly the ones related to the applicants not being able to return to their own homes.

The CoM in its examination of the execution of the judgment regarding general measures stated that in the context of the friendly settlement and of the unilateral declarations in these cases, the Romanian authorities undertook, aside for the payment of various amounts to the applicants, to adopt a number of general measures. The Romanian authorities provided an action plan for the execution of these judgments on 15 June 2011 and they are presented in the information document CM/Inf/DH(2011)37.[617] Also, on 12 September 2011, the Romanian authorities presented a revised Action plan. On 16 February 2012, they provided additional information on the implementation of the general measures announced in the revised action plan as well as clarifications on a number of outstanding issues identified in the information document CM/Inf/DH(2011)37. A lot of helpful information was provided to the CoM by the ERRC in its Communication to the CoM on the implementation of the judgment. An outline of these communications and of the Romanian authorities' responses thereto is presented in the information document CM/Inf/DH(2011)37.

In the decision adopted at the 1144th meeting, the CoM noted that the revised Action plan provided clarifications on some of these questions, in particular as regards the

[616] Ibid [107]-[109].
[617] Committee of Ministers, Ministers' Deputies, Information documents CM/Inf/DH(2011)37.

content of the measures taken in respect of the communities Plaiesii de Sus, Casinul Nou and Bolintin Deal. Furthermore, the CoM Deputies took note with interest of the revised Action plan presented on 24 May 2012 by the Romanian authorities. However, it noted that the new organisational and financial framework for the implementation of the remaining measures for the locality of Hadareni had still not been adopted. Finally, it decided to resume consideration of all the issues in the light of the additional information and the clarifications awaited from the Romanian authorities.[618]

This judgment, that does not represent an abbreviation from the original Article 8 idea, also has visible socio-economic elements since it has been more than 15 years from the events in Hadareni took place and more than 5 years since the judgment has been made by the Court and still the situation is unsatisfactory.

There are several other cases under the Convention where the state agents were directly involved in the destruction of and eviction from the home and caused the applicants' homeless, the most significant being about the burning of houses by the Turkish security forces in southeast Turkey.[619] In these cases the state agents deliberately burned the applicants' homes and the Court found that there was no doubt that these acts constituted particularly grave and unjustified interferences with the applicant's right to respect for their private and family lives and homes. All of those cases were decided before the 2001 and they are still on the list of CoM pending cases.[620]

In a really important inter-state case concerning forced evictions of Greek Cypriots from their homes and lands in northern Cyprus (following the occupation by the Turkish army in 1974), the Court found Turkey responsible, on the same principle, of forced evictions of these population and of refusing to guarantee them the right to return to the homes and villages.[621]

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618 Current state of execution, *Moldovan and others v Romania*, <http://www.coe.int/t/dghl/monitoring/execution/Reports/pendingCases_en.asp?CaseTitleOrNumber=moldovan+and+others&StateCode=ROM&SectionCode=> accessed 20 June 2012.

619 For example: *Akdivar v Turkey* (1997) 23 E.H.R.R. 143; *Selcuk and Asker v Turkey* (1998) 26 EHRR 477; *Mentes and Others v Turkey* (1998) 26 E.H.R.R. CD1; *Dulas v Turkey*, App no 25801/94 (ECtHR, 30 January 2001); *Bilgin v Turkey* (2003) 36 E.H.R.R. 50; and *Orhan v Turkey* App no 25656/94 (ECtHR, 18 June 2002).

620 Current state of execution, *Akdivar and others v Turkey*, <http://www.coe.int/t/dghl/monitoring/execution/Reports/pendingCases_en.asp?CaseTitleOrNumber=Akdivar&StateCode=TUR&SectionCode=> accessed 16 July 2012.

621 *Cyprus v Turkey* (n 544).

In all of these cases the Court found a state to be under an obligation to provide the applicants with the adequate housing, since the state agents were directly involved in the destruction of the applicants' homes. However, even the execution of these judgments is surrounded with numerous obstacles, mainly because of their complexity, the impossibility in executing them within a short period of time and the fact that states need to incur substantial financial expenditure.

7.3.2 THE SECOND GROUP OF CASES

The Court has been more reluctant in finding a violation of Article 8 in situations where actions by state bodies had a disproportionate socio-economic impact on the individual or a group, which amounted to a form of indirect socio-economic discrimination.[622]

The most notable cases are the ones concerning land development controls in the UK which led to lot of Roma people (Gypsies) being left technically homeless.[623] These controls made it particularly difficult for Roma people to obtain permission for the stationing of a caravan, which is a form of accommodation favoured by the majority of UK Roma.[624] In all of these cases the applicants accepted that there was a need for the regulation of land use, but they claimed that the state action that led to them being evicted had had a disproportionate socio-economic impact. Because of that, the applicants requested that either the scheme be reconfigured to enable them to accommodate themselves or that the State provide them with accommodation.[625]

In the first case concerning Roma people, *Buckley v United Kingdom*,[626] the applicant's retrospective application for planning permission for the caravans was refused by the District Council, which issued an enforcement notice requiring the caravans to be removed within a month. She was left to apply for a pitch at an official site for Gypsies nearby which she claimed was unsuitable for a single woman with children. She alleged a violation of Article 8 of the Convention and/or of Article 8 in conjunction with Article 14. The Court first declared that although the applicant had lived illegally on the caravan

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622 Clements and Simmons (n 547), 414.
623 *Buckley v United Kingdom* (n 611); *Chapman v United Kingdom* (n 11); *Connors v United Kingdom* (n 608); and *Coster v United Kingdom* (2001) 33 E.H.R.R. 20.
624 Clements and Simmons (n 547), 414.
625 Ibid.
626 *Buckley v United Kingdom* (n 611).

site, the present case concerned her right to respect for her home.

The Court, in its assessment recalled its previous practice to admit the national authorities' wide margin of appreciation especially in spheres involving the application of economic or social policies, but nevertheless stressed that their decision remains subject to review for conformity with the requirements of the Convention. In the instant case the interests of the community were to be balanced against the applicant's right to respect for her home, a right which is pertinent to her and her children's personal security and well-being. The importance of that right for the applicant and her family also had to be taken into account in determining the scope of the margin of appreciation allowed to the respondent State. The Court's task was to determine whether the reasons relied on to justify the interference in question were relevant and sufficient under Article 8(2). It concluded it "is satisfied that the reasons relied on by the responsible planning authorities were relevant and sufficient, for the purposes of Article 8, to justify the resultant interference with the exercise by the applicant of her right to respect for her home. In particular, the means employed to achieve the legitimate aims pursued cannot be regarded as disproportionate. In sum, the Court does not find that in the present case the national authorities exceeded their margin of appreciation."[627] Therefore, no violation of Article 8 occurred and even though the Court stressed the importance of the right to have a caravan sited at that particular location to the applicant and her children, it decided that the state's right to a wide margin of appreciation should prevail.

In the next case, *Chapman v United Kingdom*,[628] the Court again found no violation of Article 8. The approach of the Court was in many ways similar to the approach in the *Buckley* case since the facts of the case were also quite similar. The Court stated "while it is not formally bound to follow any of its previous judgments, it is in the interests of legal certainty, foreseeability and equality before the law that it should not depart, without good reason, from precedents laid down in previous cases." So, it did not.

However, in the *Chapman* case the Court provided us with some interesting points of view. It observed that there might be a need for certain measures of so-called positive discrimination towards minorities, but it did not believe that there was a sufficiently concrete consensus among the Member States for the Court to in any way impose such

[627] Ibid [84].
[628] *Chapman v United Kingdom* (n 11).

measures. It also clearly stated that:

"It is important to recall that Article 8 does not in terms give a right to be provided with a home. Nor does any of the jurisprudence of the Court acknowledge such a right. While it is clearly desirable that every human being has a place where he or she can live in dignity and which he or she can call home, there are unfortunately in the Contracting States many persons who have no home. Whether the State provides funds to enable everyone to have a home is a matter for political not judicial decision."[629]

Therefore, the Court rejected the idea of the state's obligation to provide an individual, or even an individual who is a member of an endangered minority, with a home or any kind of help regarding their accommodation.

What is also interesting to notice in this case is the opinion of the minority. The case was decided by the Grand Chamber and of the seventeen judges seven were of the opinion that a violation of Article 8 had actually occurred.[630] They were of the opinion that the Court had a duty to review the approach adopted in the *Buckley* case in the light of current conditions and the parties' arguments and, if necessary, adopt the approach to give practical effect to the rights guaranteed under the Convention. They considered that the *Buckley* judgment could not bind the Court, whose first task was to implement effectively the Convention system. Furthermore, they stressed that attention must be paid to the changing conditions in Contracting States and give recognition to any emerging consensus in Europe as to the standards to be achieved. According to them, although the essential object of Article 8 is to protect the individual against arbitrary action by public authorities, there might in addition be positive obligations inherent in an effective respect for private and family life and the home. Their principal disagreement with the majority lay in their assessment that the interferences were necessary in a democratic society. They claimed that the environmental arguments put forward by the Government did not disclose a pressing social need.

It is clear there is no common position developed by the judges on the Roma people cases and state obligations towards their accommodation.

The next case was *Connors*[631] and here the Court actually did find that the applicant's Article 8 right to respect for home has been violated. However, it did so because it

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[629] Ibid [99].
[630] Ibid, Joint Dissenting Opinions of Judges Pastor Ridruejo, Bonello, Tulkens, Strážnická, Lorenzen, Fischbach and Casadevall [1].
[631] *Connors v United Kingdom* (n 608).

placed particular emphasis on the lack of procedural protection to Gypsies on local authority sites, not because it decided to extend the scope of positive obligations under Article 8.[632] The facts of the case were quite similar to the *Buckley* and *Chapman* cases. In this case, Mr Connors complained that the eviction of his family from a local authority run gypsy site contravened Articles 6, 8, 13, 14 and Protocol 1 Article 1. Apart from one short absence, the family had lived on the site, which they had a licence to occupy, for 14 years. However, they were evicted after being given a final written warning about anti-social behaviour and nuisance caused to other residents by their relatives and visitors to the site. The notice to quit was not accompanied by reasons for the decision and a possession order was granted by the county court when Mr Connors application for judicial review was refused. The Court held, upholding the complaint under Article 8, that the serious consequences of evicting the family required detailed reasons to be given. Security of tenure extended to gypsy sites and site management would not be affected by the requirement to give reasons for evicting long term residents. Furthermore, the failure to justify the eviction decision meant that the local authority had acted in breach of procedural safeguards in violation of Article 8. The Court made a great effort to distinguish this case from other Roma people cases by stressing the lack of procedural safeguards. It pointed out numerous times that the eviction of the applicant and his family was not attended by the requisite procedural safeguards, and cannot therefore be regarded as justified by a "pressing social need" or as proportionate to the legitimate aim pursued.

Other Roma people cases, all decided on 18 January 2001 had the same outcome as *Buckley* and *Chapman*,[633] meaning that the Court found no violation of Article 8.[634] In all the cases the facts were similar, and as with the *Chapman* case judgments were delivered by the Grand Chamber where a minority of seven judges expressed their dissenting opinion invoking the same arguments as in *Chapman*.

Only in the *Connors* and *Kay* cases did the Court find a violation by referring to the seriousness of interference combined with the lack of procedural safeguards. However,

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632 The Court also found a violation of Article 8 due to the lack of procedural safeguards in *Kay v United Kingdom* App no 37341/06 (ECtHR, 21 September 2010) (the procedural safeguards required by Article 8 for the assessment of the proportionality of the interference had not been observed in that the applicants had been dispossessed of their homes without the proportionality of the measure being determined by an independent tribunal, so that there had been a violation of Article 8).

633 Except the *Kay* case (n 631).

634 *Coster v United Kingdom* (n 623); *Beard v United Kingdom* (2001) 33 E.H.R.R. 19; *Lee v United Kingdom* (2001) 33 E.H.R.R. 29; and *Smith (Jane) v United Kingdom* (2001) 33 E.H.R.R. 30.

one can assume that in all the other cases the Court could also have decided that there has been a violation of Article 8. It is not hard to imagine that the opinion of the minority could have turned into the opinion of the majority.[635]

The *Connors* judgment is still under supervision by the CoM. Secondary legislation was required in England and Wales to bring section 318 of the Housing and Regeneration Act 2008 into effect, extending the protection contained in the Mobile Homes Act 1983 to local authority Gypsy and Traveller sites. According to the latest information provided by the UK authorities to the CoM, this was laid before Parliament. Further information is awaited on the progress of the legislation.[636]

In the most recent case concerning Roma people where at stake was the issue of their eviction from a settlement situated on municipal land in an area of Sofia, the Court decided to depart from its previous (UK) case-law and held that there would be a violation of Article 8 if the removal order were enforced.[637] The applicants were 23 Bulgarian nationals who live in a neighbourhood in the outskirt of Sofia, which housed about 250 other Roma. Most of them had lived in the area from the 1960s and 1970s and their homes were built without authorisation. They claimed that they could not apply for authorisation because they were poor and the relevant law did not make it possible for them to obtain ownership of their houses. Although the issue of their settlement was widely debated, until 2005 state authorities had never attempted to remove the applicants and their families. However, in 2005 the district mayor had ordered the applicants' forcible removal and in 2006, the Sofia municipal council transferred ownership of land where the applicants lived to a private investor. In June 2006, the municipal authorities announced their intention to evict the unlawful Roma residents, including the applicants, within a week and to demolish their homes. Due to political pressure (mainly from the European Parliament), the eviction did not take place. However, the mayor publicly stated that it was not possible to find alternative housing for the settlement's inhabitants. In 2006 the application was lodged with the Court. Following another attempt to remove the applicants, in June 2008 the Court indicated to the Bulgarian Government under its rule on interim measures, that the applicants should not be evicted until such time as the authorities assured the Court of

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635 Koch, *Human Rights as Indivisible Rights*… (n 2) p. 124.
636 Current state of execution, *Connors v United Kingdom*, <http://www.coe.int/t/dghl/monitoring/execution/Reports/pendingCases_en.asp?CaseTitleOrNumber=Connors&StateCode=UK.&SectionCode=> accessed 17 July 2012.
637 *Yordanova and Others v Bulgaria* (n 233).

the measures they had taken to secure housing for the children, elderly, disabled or otherwise vulnerable people.

In its assessment of the case, the Court first observed that the houses where the applicants lived had become their homes within the meaning of Article 8.[638] The Court was satisfied that the impugned removal order had a valid legal basis in domestic law and that that the impugned measure, if enforced, would have a legitimate aim under Article 8(2) of the Convention.

As to the necessity in the democratic society the Court invoked the state's margin of appreciation. However, it went to say that the municipal authorities did not give reasons other than that the applicants occupied land unlawfully and that before issuing the impugned order the authorities did not consider the risk of the applicants' becoming homeless if removed. Furthermore, the Court stated that the authorities failed to recognise the applicants' situation as an outcast community and one of the socially disadvantaged groups. It again emphasized there was no obligation under the Convention to provide housing to the applicants. However, an obligation to secure shelter to particularly vulnerable individuals might flow from Article 8 in exceptional cases.[639]

The Court reached the conclusion that there would be a violation of Article 8 in the event of enforcement of the deficient order as it was based on legislation which did not require the examination of proportionality and was issued and reviewed under a decision-making procedure which not only did not offer safeguards against disproportionate interference but also involved a failure to consider the question of "necessity in a democratic society".[640]

It is clear that the judgment prohibiting the Bulgarian authorities from evicting Roma people has numerous financial and socio-economic implications on Bulgaria. The Court itself expressed the view that the general measures in execution of this judgment should include such amendments to the relevant domestic law and practice so as to ensure that orders to recover public land or buildings, where they may affect Convention protected

638 Ibid [103].
639 Ibid [130].
640 Ibid [144].

rights and freedoms, should, even in cases of unlawful occupation, identify clearly the aims pursued, the individuals affected and the measures to secure proportionality.[641]

Therefore, we can see that the Court decided to change its approach regarding eviction of Roma people and to narrow the state's margin of appreciation. It had a rather cautious approach in the UK cases where it invoked the special vulnerability of the Roma people,[642] and yet it found that whether the state provides funds to enable everyone to have a home is a political not judicial decision.[643] In this case it decided to depart from this view. Furthermore, in the UK cases it stated it is highly relevant whether or not the home was established unlawfully,[644] which was clearly not the case in *Yordanova.* Finally, in the UK cases, the Court concluded by saying: "If the applicant's problem arises through lack of money, then she is in the same unfortunate position as many others who are not able to afford to continue to reside on sites or in houses attractive to them."[645] In *Yordanova*, the Court did not consider that the applicants are in the same unfortunate position as many others, but that they needed special assistance.

The Court could have easily reached the same conclusions in *Yordanova* as it did in the UK Roma people cases and allowed the state a wide margin of appreciation. It decided to depart from the views expressed in UK cases, and although it invoked exceptional circumstances, it is clear it extended the states' positive obligations under Article 8. It remains to be seen what approach the Court will adopt in future similar cases.

Four more interesting cases, not involving Roma people, can also be mentioned under this second group of cases. In one of them, *McCann v United Kingdom,*[646] the Court again invoked procedural safeguards and relied on them when finding a violation of Article 8. Here, a local authority summarily evicted a joint tenant by issuing a notice to quit instead of complying with the statutory procedure for the allocation of public housing, particularly the Housing Act 1985. The Court found that it had violated the tenant's right to respect for his home, since there had been no possibility of having the proportionality of that measure determined by an independent tribunal.

This case is still under CoM supervision and in relation as to the general measures the

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641 Ibid [166].
642 *Chapman v United Kingdom* (n 11).
643 Ibid [99].
644 Ibid [102].
645 Ibid [113].
646 *McCann v United Kingdom* (n 123).

CoM noted certain improvements in domestic law where the question of whether a local authority's decision to repossess a home is proportionate within the meaning of Article 8 must be considered by a court. There have been improvements within the UK legal system where the Supreme Court delivered a judgment consistent with the Court's judgment (*Pinnock v Manchester City Council*).[647] However, information is awaited on the response of the UK authorities following the Supreme Court's conclusions in *Pinnock*.[648]

In a Croatian case, *Paulić v Croatia*,[649] the Court found a violation of Article 8 due to the possible eviction of the applicant from his home. However, as with the *Connors* and *McCann* cases, the Court placed greatest emphasis on the procedural issues, finding a violation not because it considered a loss of the applicant's home to be a violation of Article 8 but because of the lack of procedural safeguards. Here the Court did not just refer to the principle of proportionality but also of reasonableness.[650] Unfortunately, the Court did not explain the meaning of reasonableness so we cannot reach a conclusion on what influence it had on the Court when delivering its judgment.

However, in another Croatian case, *Blečić v Croatia*,[651] the Court has again shown its unwillingness to protect a person's right to home unless well established, strong criteria have been satisfied and again invoked the state's wide margin of appreciation.[652] In *Blečić* the applicant was a Croatian national who in 1953 acquired a specially protected tenancy, which was at the time quite common in Croatia, on a flat in Zadar. On 26 July 1991, she went to stay with her daughter in Rome planning to stay only during the summer. By the end of August the armed conflict in Croatia had escalated and from mid-September Zadar was exposed to constant shelling and the supply of water and electricity was disrupted. In October 1991, the applicant's pension was stopped and she lost the right to medical insurance. Having no means of subsistence and no medical insurance, and being in poor health, she decided to stay in Rome. The following month, her flat was broken into and occupied by a family. She did not return to Zadar until May 1992. However, before her return, on 12 February 1992, Zadar Municipality brought a

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647 [2011] UKSC 6.
648 Current state of execution, *McCann v United Kingdom*, <http://www.coe.int/t/dghl/monitoring/execution/Reports/pendingCases_en.asp?CaseTitleOrNumber=Mc+CANN&StateCode=UK.&SectionCode=> accessed 16 July 2012.
649 (n 213).
650 Ibid [44].
651 *Blečić v Croatia* (2005) 41 E.H.R.R. 13.
652 Ibid, "State intervention in socio-economic matters such as housing is often necessary in securing social justice and public benefit. In this area, the margin of appreciation available to the State in implementing social and economic policies is necessarily a wide one." [65].

civil action against the applicant for termination of her tenancy, on the ground that she had been absent from the flat for more than six months without justification. The applicant claimed that she had not been able to return to Zadar given the war in Croatia and because she had no money, no medical insurance and was in poor health. The Croatian courts ultimately terminated the applicant's specially protected tenancy, finding that the reasons given by the applicant did not justify her absence.

The applicant then lodged a complaint to the Court claiming a violation of Article 8 and Article 1 Protocol 1. When looking at the claim regarding Article 8, the Court first stressed that it was satisfied that the applicant did not intend to abandon the flat and that the flat in question could therefore reasonably be regarded as her home. Furthermore, the Court noted that the termination of her tenancy was in accordance with the national law. The legislation was intended to promote the economic well-being of the country and the protection of the rights of others. The Court again observed that in the housing area the margin of appreciation to the state is a wide one and looked at whether the measure employed was manifestly disproportionate to the legitimate aim pursued. It concluded that the solution the Croatian courts reached in seeking a fair balance between the demands of the general interest of the community and the requirement of protecting the applicant's right to respect for her home was not manifestly disproportionate to the legitimate aim pursued. The Court held, unanimously, that there had been no violation of Article 8 of the Convention.

This case was referred on appeal to the Grand Chamber[653] and during the Grand Chamber proceedings the Croatian Government for the first time complained about the Court's lack of temporal jurisdiction.[654] The Grand Chamber, with a majority of 11 votes to six, determined that it could not review Croatia's termination of Ms Blečić occupancy/tenancy rights (OTR) because the case lay outside its temporal jurisdiction. In so doing, it reversed two prior decisions of the First Section Chamber; an admissibility decision issued in January 2003, and a decision on the merits of the case issued in July 2004, admitting the case for review.[655]

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653 *Blečić v Croatia* (2006) 43 E.H.R.R. 48 (GC Decision).

654 Croatia became subject to ECHR jurisdiction as of 5 November 1997.

655 *Blečić v Croatia* (n 653). This decision is a controversial one, but not only for the reasons discussed in this chapter but also for the Court's reasoning when deciding that this case falls outside of its temporal jurisdiction. For an interesting and (in my opinion) quite understandable critiques see dissenting opinion of Judge Zupančič joined by Judge Cabral Barreto. Also see the dissenting opinion of Judge Loucaides

Both the Chamber and the Grand Chamber decisions show the Court's inconsistency and the judges' discrepancy in dealing with difficult and controversial issues and it might be said that "the concept of the margin of appreciation has become as slippery and elusive as an eel. Again and again the Court now appears to use the margin of appreciation as a substitute for coherent legal analysis of the issues at stake."[656] For these cases, it seems that the Court used the doctrine of a margin of appreciation on a somewhat discretionary basis, not setting out clear standards as to when it will narrow it and when it will allow the states a wide margin.

However, in a subsequent Croatian case[657] that also deals with the issue of special protected tenancy, the Court decided to depart from the view adopted in *Blečić* (by the Chamber, since the Grand Chamber did not even discuss the merits of the case). The facts of the *Bjedov* are quite similar to the ones in the *Blečić*. The applicant was a Croatian national who lived in a flat in Zadar from 1975 on which she and her husband were awarded special protected tenancy. In August 1991 she and her husband went to the village of Mokro Polje where in September her husband fell ill. They also found out that third persons had broken into and occupied their flat. In these circumstances they decided to stay in Mokro Polje. Her husband died in 1994 and Mrs Bjedov went to live with her daughter in Switzerland. She returned to Zadar in 1998 and lived in a friend's flat until 2001, when third parties moved out of her flat. Meanwhile, in 1995 she made a request to buy her flat in Zadar. The national authorities, just like in the *Blečić*, found that her absence had been unjustified and therefore that she was not entitled to buy the flat and ordered her eviction. The applicant lodged a complaint to the Court, and unlike in *Blečić*, the Court actually did find a violation of Article 8. The Court accepted the Croatian allegations that the interference with the applicant's right was prescribed by law and had a legitimate aim, but it found that her eviction was not 'necessary in a democratic society'. Therefore, the Court acknowledged the state's margin of appreciation in this regard but went on by saying:

"While it is true that the applicant's eviction had been temporarily adjourned on health grounds in the course of the enforcement proceedings, this in itself does not satisfy the requirement that the reasonableness and the proportionality of the eviction order as such has to be assessed by an independent

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joined by Judges Rozakis, Zupančič, Cabral Barreto, Pavlovschi and Davíd Thór Björgvinsson and dissenting opinion of Judge Cabral Barreto. Also see n 752 in Section 8.2.3.

656 Lord Lester of Herne Hill (n 208), 75.

657 *Bjedov v Croatia* App no 42150/09 (ECtHR, 29 May 2012).

tribunal. The enforcement proceedings – which are by their nature non-contentious and whose primary purpose is to secure the effective execution of the judgment debt – are, unlike regular civil proceedings, neither designated nor properly equipped with procedural tools and safeguards for the thorough and adversarial examination of such complex legal issues. Therefore, competence for carrying out the test of proportionality lies with a court conducting regular civil proceedings in which the civil claim lodged by the State and seeking the applicant's eviction was determined (see *Paulić v. Croatia*, no. 3572/06, § 44, 22 October 2009).

There has, therefore, been a violation of Article 8 of the Convention in the instant case."[658]

The Court also pointed out the applicant's age and poor health, while in *Blečić* case it did not give much relevance to Mrs Blečić age and health. Also, to Mrs Bjedov the local authorities offered to pay the amount necessary for her to be able to live in the Home for Elderly while nothing similar was offered to Mrs Blečić.

The *Bjedov* and *Blečić* cases were based on similar factual situations: both applicants were elderly and vulnerable, and the national authorities based their decisions on the same Housing Act. Yet, in *Bjedov* case the Court decided to depart from approach adopted in *Blečić*. For that reason, today we have two cases with almost the same factual situation with two different decisions from the Court.

Complaints raising similar issues to the ones discussed above also have come before the ESCR, and it will be seen that the ECSR has taken a different and more consistent approach in its decisions than the Court took in its judgments that raise controversial issues with significant socio-economic elements.

7.3.3 THE THIRD GROUP OF CASES

Even more socio-economic elements can be found in the following cases which belong to the final group of cases that will be examined here. It is in these cases, where the state or its agents were not the cause of the applicants' situation that most clearly show when and if the Court is ready to impose positive obligations in relation to the right to adequate housing and to what content.

[658] Ibid, [71] and [72].

The first case where the state's responsibility was invoked for not providing adequate accommodation for a (vulnerable) applicant is *Burton v United Kingdom.*[659] Here the applicant was a Roma person by birth whose parents took the decision to move into settled accommodation having suffered repeated evictions from sites where they had stationed their caravan and in the absence of any provision of permanent caravan sites. The applicant was diagnosed with a serious cancer and after finding out that it was incurable she intensified her desire to live out her last days and die in a caravan, according to her Romany gypsy traditions. The Council attempted but was unable to provide a location on which the applicant's family could station their caravan. A request to live in a mobile home owned by the council was refused, the Council considering the mobile home unsuitable for habitation.

The applicant invoked both Articles 3 and 8. Regarding Article 8 she claimed that because of the combined effect of legislation and Government planning policy she was unable to pursue her traditional way of life in a caravan that belonged to her family without the family being in breach of law. She claimed there was a disproportionate interference in her traditional way of life. When assessing her allegations, the Commission did actually invoke positive obligations inherent in Article 8. However, the Commission pointed out that it did not consider that Article 8 could be interpreted in such way as to extend a positive obligation to provide alternative accommodation of an applicant's choosing. Therefore, the Commission in its findings stated there was no right to accommodation of an applicant's choosing.

In the next case concerning the right of a vulnerable individual to adequate accommodation, *Marzari v Italy,*[660] the applicant was an Italian national, born in 1944, who started suffering from a rare and serious illness called metabolic myopathy in 1965. However, the applicant's illness was not diagnosed until 1979. In 1980 the applicant was recognised as 100% disabled. From 1973 he had lived in a privately rented apartment which he had adapted, at his own expense, to his needs in view of his pathology. In 1988 the Trentino Institute for Housing (ITEA) expropriated the building. ITEA intended to renovate the building, and tried to find another suitable accommodation for the applicant, who demanded the respect of certain criteria and technical characteristics. On 8 August 1991, the second apartment was allocated to the applicant by ITEA; and

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[659] *Burton v United Kingdom* (1996) 22 E.H.R.R. CD134.
[660] *Marzari v Italy* (n 607).

the applicant moved into it, despite the fact that he considered it to be inadequate to his needs. During the next 7 years the applicant was in numerous disputes with the ITEA since in 1993 he had ceased the payment of the rent, demanding that certain works be carried out in the apartment with a view to making it fit for his needs. In 1994 ITEA instructed its lawyer to pursue the applicant's eviction because of his outstanding debt to ITEA. On 28 January 1998 the applicant was evicted. He went to live in a camper van parked in the main square of Trento. On 9 March 1998 the provincial body on residential housing stated that it would not be possible to allocate another apartment to the applicant, on account of his insolvency. On 19 March 1998 the applicant was hospitalised in Trento; his condition had dramatically deteriorated on account of his living in an inadequate environment (camper van); however, a month before that he had been allocated a third apartment.

In May 1997 he lodged a complaint to the Court complaining, among other things, about the local administrative authorities' failure to provide him with accommodation adequate to his disability. The Court found that the applicant's eviction from his apartment interfered with his rights under Article 8(1). The Court therefore had to examine whether the interference was justified under the terms of Article 8(2). First, the Court stated that the interference at issue was in accordance with the law and that it had a legitimate aim. As to the question whether the interference complained of was necessary in a democratic society, the Court underlined that the applicant's medical condition was particularly relevant to the need of appropriate accommodation: the applicant had to be hospitalised as a consequence of his living in a camper van after his eviction. However, the applicant was never co-operative and did not use the venues which were available to him and which were even pointed out to him in order to avoid the eviction. In these circumstances, the Court did not find any appearance of a breach of Article 8 on account of the authorities' decision to proceed with the applicant's eviction from the second apartment. The Court considered that the local authorities could be considered to have discharged their positive obligations in respect of the applicant's right to respect for his private life.

Presumably the Court, unlike the applicant, thought that the second flat was adequate since the offer of the third flat came seven years after the applicant's eviction from the first flat. Also, the applicant in this case was never co-operative and the authorities were

willing to help the applicant with his housing problems, so the Court found the application inadmissible because manifestly ill-founded.[661]

Nevertheless, the Court did not rule out that the assessment might have been different had the applicant not been offered this apartment. It stressed that:

"…although Article 8 does not guarantee the right to have one's housing problem solved by the authorities, a refusal of the authorities to provide assistance in this respect to an individual suffering from a severe disease might in certain circumstances raise an issue under Article 8 of the Convention because of the impact of such refusal on the private life of the individual. The Court recalls in this respect that, while the essential object of Article 8 is to protect the individual against arbitrary interference by public authorities, this provision does not merely compel the State to abstain from such interference: in addition to this negative undertaking, there may be positive obligations inherent in effective respect for private life. A State has obligations of this type where there is a direct and immediate link between the measures sought by an applicant and the latter's private life."[662]

The next case where the state's obligation of providing a vulnerable individual with adequate housing was under review is *O'Rourke v United Kingdom*.[663] The applicant was an individual who upon coming out of prison was provided with temporary accommodation in a hotel room pending a local authority decision as to whether he was eligible for housing as a homeless person. The temporary accommodation was allocated to him due to his health problems. He was later evicted from temporary accommodation, following complaints about his behaviour there. The applicant was later on offered a tenancy, but he refused it as he believed that the majority of the surrounding tenants were aware of his past history and claimed that he had been threatened. He remained on the streets for 14 months, to the detriment of his health, since his eviction from the hotel. On 2 February 1994 (more than 2 years after his eviction) he was offered a secure tenancy, which he accepted subject to repairs and decorations being carried out. The applicant's tenancy commenced on 28 February 1994.

In the meantime he complained to the Court that his eviction and failure to provide him with accommodation led to a violation of Articles 3 and 8. As to the claim of violation of his Article 8 right to respect for private life, the Court mainly repeated the wording from the above mentioned cases regarding how it considers that the scope of any

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661 The Court discussed this case in terms of respect for private life rather than respect for the home.
662 *Marzari v Italy* (n 607).
663 *O'Rourke v United Kingdom* App no 39022/97 (ECtHR Decision, 26 June 2001).

positive obligation to respect the applicant's private life must be limited. It concluded that even if the applicant's hotel room might be considered as home it found that the eviction following complaints about the applicant's conduct was in accordance with the law. The eviction was also proportionate in pursuit of the legitimate aims of preventing disorder or crime at the hotel and protecting the rights and freedoms of the proprietors, their staff and other guests. The Court eventually found the application regarding Article 8 to be manifestly ill-founded since the applicant himself for a long time obstructed his placement in suitable accommodation.

Therefore, in these three applications the Court (and the former Commission) did find the applications inadmissible putting a great emphasis on the fact that vulnerable applicants had some sort of accommodation or that it was mainly their fault for losing the accommodation provided for them. Although we might argue that the Court should not have declared the applications inadmissible and rather should have discussed the merits and examined the applications more carefully, one might suspect that again the Court would not have found a violation of their rights. The cases where the applicants were vulnerable individuals to whom the state had not provided any accommodation have not been raised before the Court so we cannot say with any certainty whether the Court really accepted the idea of positive obligations in terms of respect for private life on part of the state to provide an accommodation to vulnerable individuals.

In the first group of cases, where the states agents were directly involved in causing the applicants' homelessness and where the Court found a violation of Article 8, the applicants problems are now, years after their housing problem occurred, still not solved. In the second group of cases, where actions by state bodies, legitimate under national law, caused individuals to lose or move from their home, the judges have shown a certain amount of inconsistency and the Court was, up until the *Yordanova* case, reluctant to find a violation for any circumstances other than lack of procedural safeguards. With the *Yordanova* case it decided to change its approach regarding the eviction of Roma people. This judgment was delivered in April 2012 so it is to be seen whether the judges will follow this approach in the future cases. And in the third group of cases, primarily concerned with positive obligations regarding adequate housing, the Court was not ready to find a violation or even consider the merits of the case and made a clear statement that Article 8 does not guarantee a right to have one's housing problem solved by the authorities. The Court did make some interesting points

regarding the state's obligations toward certain groups of people; nevertheless the circumstances under which state might be responsible to provide adequate housing for the applicants are still not clear.

Finally, in all the groups of cases discussed above, the Court has shown ambiguity and reluctance in guaranteeing the right to adequate housing although it has made some interesting points that might lead us to the conclusion that in certain cases the state will be under obligation to provide housing for a person under its jurisdiction. However, it seems that, at least so far, the Court decided to refrain from imposing positive obligations on states regarding the right to adequate housing when the state agents or bodies are not the cause of the applicants' situation, presumably having in mind the socio-economic elements of such decisions.

7.3.4 THE CASE OF M.S.S. V GREECE AND BELGIUM

Just as with the right to health, discussed in the previous chapter, where the Court actually recognized the state's obligation to provide healthcare to a vulnerable applicant and declared that his expulsion would amount to a violation of Article 3,[664] here we have a case where the Court delivered one specific judgment stating that not providing the applicant with satisfactory living conditions amounted to a violation of Article 3.[665]

In this case, the applicant (originally from Afghanistan) left Kabul in 2008 and entered the European Union through Greece. In Greece, he was fingerprinted and detained for a week. He was then issued with an order to leave the country. He left Greece and entered Belgium, where he applied for asylum. The Belgian Aliens Office submitted a request for the Greek authorities to take charge of the asylum application. In late May 2009, the Aliens Office ordered the applicant to leave the country for Greece, where he would be able to submit an application for asylum. The applicant lodged an appeal with the Aliens Appeals Board, arguing that he ran the risk of detention in Greece in appalling conditions, that there were deficiencies in the asylum system in Greece and that he feared ultimately being sent back to Afghanistan where he claimed he had

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[664] *D. v United Kingdom* (n 135).
[665] *M.S.S. v Belgium and Greece* App no 30696/09 (ECtHR, 21 January 2011).

escaped a murder attempt by the Taliban in reprisal for his having worked as an interpreter for the air force troops stationed in Kabul.

Regardless of his claims, the applicant was transferred to Greece on 15 June 2009. On arriving at Athens airport, he was immediately placed in detention in an adjacent building, where, according to his reports, he was locked up in a small space with 20 other detainees. Following his release and the issue of an asylum seeker's card on 18 June 2009, he lived on the street, with no means of subsistence. Having subsequently attempted to leave Greece with a false identity card, he was arrested and again placed in the detention facility for one week, where he alleges he was beaten by the police. After his release, he continued to live in the street.

Before the Grand Chamber M.S.S. alleged both Greece and Belgium had breached his human rights. Among other claims, he claimed that the state of extreme poverty in which he had lived since he arrived in Greece amounted to inhuman and degrading treatment within the meaning of Article 3. With no means of subsistence, he, like many other Afghan asylum seekers, had lived in a park in the middle of Athens for many months. The Court first stressed that it considers it necessary to point out that Article 3 cannot be interpreted as obliging the High Contracting Parties to provide everyone within their jurisdiction with a home. Nor does Article 3 entail any general obligation to give refugees financial assistance to enable them to maintain a certain standard of living. However, in this case the Court was of the opinion that what was at issue was somewhat different from in the previous cases, mainly because the obligation to provide accommodation and decent material conditions to impoverished asylum seekers has now entered into positive law (Directive 2003/9 laying down minimum standards for the reception of asylum seekers in the Member States ("the Reception Directive")).[666] Furthermore, the Court attached considerable importance to the applicant's status as an asylum seeker and, as such, a member of a particularly underprivileged and vulnerable population group in need of special protection. The situation of which the applicant complained had lasted since his transfer to Greece in June 2009 and was linked to his status as an asylum seeker. Had the authorities examined his asylum request promptly, they could have substantially alleviated his suffering. It followed that through their fault he had found himself in a situation incompatible with Article 3 constituting degrading treatment.

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[666] Ibid [250].

The Court on numerous occasions throughout this judgment stressed the specific circumstances of this case, barring and protecting itself from possible applications that might arise regarding the right to adequate housing or the state's obligation to provide living conditions of a certain standard to every individual. Even more importantly, this case concerned an asylum seeker whose situation (while in detention) might be compared to that of persons deprived of their liberty. While living in the street he had no possibility of getting any means of subsistence because of the state denying him documents that would enable him to work or get any financial support. This is one of the reasons why, at the beginning of the discussion of this case it was compared with *D. v UK,* a case where the applicant was not detained any more, but was still highly dependent on the state.

As we can see, regarding the right to adequate housing the Court has not gone nearly as far as it did with providing satisfactory detention conditions and with a right to live in a healthy environment. It found violations in situations where the state agents were directly involved in the destruction of and eviction from the home. However, even though these cases do not represent Court's wide use of interpretative powers and reading more into existing rights, the problems of execution have already arisen during the implementation of these judgments. It takes a long time for the states to execute the judgments and the progress is very slow. Furthermore, the Court's jurisprudential limits of a judicial approach in the cases where the states have not directly caused the applicants' homelessness or housing problems, shows that in these situations the Court on most occasions decided to reject the integrated approach and not place an economic burden on states by requiring the provision of adequate housing to certain, vulnerable groups or individually. It generally decided to accept the negative positive dichotomy of rights putting a stop to the broad interpretation of the right to adequate housing under Article 8.

In my opinion the Court did not make a mistake by not entering into the socio-economic sphere under Article 8 and by not imposing obligations on states to provide adequate housing. However, *Yordanova, Bjedov* and *M.S.S.* show certain developments in the Court's attitude when it comes to housing issues of vulnerable individuals and groups. These two cases are the most recent ones so we might understand them as indications that the Court is extending the scope of obligations inherent in Article 8 concerning adequate housing. However, the overall conclusion after seeing all the cases

discussed above might be that the right to adequate housing is not appropriate to be guaranteed under the Convention.

Now, as with the previous chapters the work of the ECSR will be analysed. The ECSR has dealt with housing issues much more unambiguously, particularly since the Revised ESC contains an explicit right to adequate housing and therefore, much more successfully than the Court.

7.4 RIGHT TO ADEQUATE HOUSING UNDER THE EUROPEAN SOCIAL CHARTER

The right to housing is guaranteed under three provisions of the ESC. Those are Article 31 of the Revised Charter, the broadest and most comprehensive provision, Article 23 of the Revised Charter and Article 16 of both the Original and the Revised Charter.

Under Article 31 of the Revised ESC the parties undertake to take measures designed: to promote access to housing of an adequate standard; to prevent and reduce homelessness with a view to its gradual elimination: and to make the price of housing accessible to those without adequate resources.[667] The Original ESC contains no equivalent provision. Under both the Original and the Revised Charter right to housing can also be found in Article 16 which states: "With a view to ensuring the necessary conditions for the full development of the family, which is a fundamental unit of society, the Parties undertake to promote the economic, legal and social protection of family life by such means as social and family benefits, fiscal arrangements, provision of family housing, benefits for the newly married and other appropriate means."[668] Article 23 of the Revised ESC deals with the right of elderly people to social protection and it requires that states "…enable elderly persons to choose their life-style freely and to lead independent lives in their familiar surroundings for as long as they wish and are able, by means of: a provision of housing suited to their needs and their state of health or of adequate support for adapting their housing…"[669] While Article 16 is a core right[670] both Article 31 and Article 23 are non-core rights.

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667 Revised ESC (n 5), Article 31.
668 Revised and Original ESC (n 5), Article 16.
669 Revised ESC (n 5), Article 23 (2)(a).

The analysis of the Reporting system and the Collective Complaints system will show us that the right to housing is well developed under the ESC; that there have been numerous reports but even more importantly, that there have been numerous collective complaints concerning the state's failure to provide the right to adequate housing to certain groups. Just as before the Court, there were numerous complaints concerning Roma people, but there were also some other important complaints where the ECSR shown its readiness to deal with the housing issues.

7.5 REPORTING PROCEDURE UNDER THE ESC AND THE RIGHT TO HOUSING

Within the Reporting system under the ECS we will look now only at Article 31 reports since Article 31 is the most comprehensive and broadest provision on the right to housing and the expectations the ECSR has on the states is most visible through this provision.[671] The ECSR has, through its reports, very clearly and in detail identified state obligations under all three Article 31 paragraphs.

When it comes to Article 31(1) the ECSR pointed out that states must guarantee to everyone the right to adequate housing and should promote access to housing in particular to the different groups of vulnerable persons.[672] The ECSR also stated that,

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[670] The ECSR has in *ERRC v Greece* (15/2003) (2005) 41 E.H.R.R. SE14 and in *International Centre for the Legal Protection of Human Rights (INTERIGHTS) v Greece* (49/2008)) (2011) 53 E.H.R.R. SE4 shown that it is willing to interpret Article 16 broadly and read in within this provisions the right to housing as guaranteed under Article 31 of the Revised Charter. This kind of interpretation might be understood as placing obligations on Greece to which it has not agreed, particularly since it has not ratified the Revised Charter. However, the biggest problem was not the wide interpretation but the proper follow-up by Greece since both of these complaints are based on similar problems concerning the housing of Roma people.

[671] Conclusions 2011 on Andorra (31(1) and 31(2)), Finland (31(1), 31(2) and 31(3)), France (31(1), 31(2) and 31(3)), Italy (31(1), 31(2) and 31(3)), Lithuania (31(1), 31(2) and 31(3)) , Norway (31(1), 31(2) and 31(3)), Netherlands (31(1), 31(2) and 31(3)), Portugal (31(1), 31(2) and 31(3)), Slovenia (31(1), 31(2) and 31(3)), Sweden (31(1), 31(2) and 31(3)), Turkey (31(1), 31(2) and 31(3)), and Ukraine (31(1) and 31(2)); Conclusions 2007 on Finland (Vol. 1, 31(1), 31(2) and 31(3)) and Italy (Vol. 2, 31(1), 31(2) and 31(3)); Conclusions 2005 on France (Vol. 1, 31(1), 31(2) and 31(3)), Lithuania(Vol. 1, 31-1 and 31-2), Norway (Vol. 2, 31-1, 31-2 and 31-3), Slovenia (Vol. 2, 31-1, 31-2 and 31-3), and Sweden (Vol. 2, 31(1), 31(2) and 31(3)); Conclusions 2003 on France (Vol. 1, 31(1), 31(2) and 31(3)), Italy (Vol. 1, 31(1), 31(2) and 31(3)), Slovenia (Vol. 2, 31(1), 31(2) and 31(3)), and Sweden (Vol. 2, 31(1), 31(2) and 31(3)) available at The European Social Charter database, Conclusions on Article 31, <http://hudoc.esc.coe.int/esc2008/query.asp?action=page&page=4&timestamp=41711.92> accessed 18 July 2012. Also see Digest of the case law of the European Committee of Social Rights (CoE 2008), available at: http://www.unhcr.org/refworld/docid/4a3f52482.html, accessed 6 August 2012, 169-175 and 349-355.

[672] Digest of the case law of the European Committee of Social Rights (n 671), Article 31-1, 170.

for the purpose of Article 31(1), the parties must define the notion of adequate housing in law. According to the ECSR "adequate housing" means a dwelling which is structurally secure, safe from a sanitary and health point of view and not overcrowded, with secure tenure supported by the law. The standards of adequate housing shall be applied not only to new constructions, but also gradually, in the case of renovation to the existing housing stock. They shall also be applied to housing available for rent as well as to owner-occupied housing.[673]

As to Article 31(2), when dealing with the issue of homelessness, the ECSR pointed out that the parties shall take reactive and preventive measures. The ECSR considers as homeless those individuals not legally having at their disposal a dwelling or other forms of adequate shelter.[674] The temporary supply of shelter, even adequate, cannot be held as satisfactory and the individuals living in such conditions and who wish so, should be provided with adequate housing within a reasonable period. Talking about the measures to reduce homelessness the ECSR stated that Article 31(2) obliges parties to gradually reduce homelessness with a view to its elimination. Reducing homelessness implies the introduction of measures such as provision of immediate shelter and care for the homeless and measures to help such people overcome their difficulties and prevent a return to homelessness.[675] The ECSR furthermore defined forced eviction as the deprivation of housing which a person occupied due to insolvency or wrongful occupation. When an eviction is justified by the public interest, authorities must adopt measures to re-house or financially assist the persons concerned.[676] In the Conclusions from 2005 and 2007 the ECSR focused more on the emergency and longer-term measures to reduce homelessness and forced evictions without the need for repeating the standards and definitions pointed out in the 2003 Conclusions.[677]

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673 Ibid, 170; ECSR Conclusions 2003, Volume 1 (n 92), 221; and ESC (Revised), ECSR Conclusions 2003, Volume 2 (Romania, Slovenia, Sweden) (CoE Publishing 2003), 122.

674 Digest of the case law of the European Committee of Social Rights (n 671), p 171 and ECSR Conclusions 2003, Volume 1 (n 92), 345; ESCR Conclusions 2003, Volume 2 (n 673), 123.

675 Digest of the case law of the European Committee of Social Rights (n 671), p 172 and ECSR Conclusions 2003, Volume 1 (n 92), 345.

676 ECSR Conclusions 2003, Volume 2 (n 673), 128-129; ECSR Conclusions 2003, Volume 1 (n 92), 136-137.

677 ESC (Revised), ECSR Conclusions 2005, Volume 1 (Bulgaria, Cyprus, Estonia, France, Ireland, Italy, Lithuania) (CoE Publishing 2006), 46-47; ESC (Revised), ECSR Conclusions 2005, Volume 2 (Moldova, Norway, Romania, Slovenia, Sweden) (CoE Publishing 2006), 79-80; ECSR Conclusions 2007, Volume 1 (n 100), 58-59; ESC (Revised), ECSR Conclusions 2007, Volume 2 (Ireland, Italy, Lithuania, Moldova, Norway, Romania, Slovenia, Sweden) (CoE Publishing 2007), 73-75.

As to the Article 31(3) in its Conclusions from 2003 the ECSR provided us with some general definitions and standards. It stated that, for the purpose of Article 31(3), parties shall ensure an adequate supply of affordable housing. The ECSR considers housing to be affordable when the household can afford to pay the initial costs, the current rent and/or other costs on a long-term basis and still be able to maintain a minimum standard of living, as defined by the society in which the household is located. The ECSR also considers that, under Article 31(3), parties are required, in order to increase the supply of social housing and make it financially accessible: to adopt appropriate measures for the construction of housing, in particular social housing, where their own direct involvement is complemented by that of other partners; to introduce housing benefits for the low-income and disadvantaged sectors of the population. Furthermore, in the 2003 Conclusions the ECSR looked at the information provided on assistance for construction, social housing and housing benefits.[678] In its Conclusions from 2005 and 2007 the ECSR focused only on social housing and housing benefits, again finding no need to repeat already established standards and definitions.[679]

The ECSR has, through the Reporting system, broadly interpreted Article 31 and given it a real meaning. It did so by defining fundamental notions, such as adequate housing, homeless persons, forced eviction and housing affordability. It also in its conclusions established what action states are required to carry out to ensure the effectiveness of the right to housing.[680] The conclusions of the ECSR in monitoring states obligations under Article 31 have demonstrated the application of a new set of benchmarks to national housing law and policy.[681]

As emphasized by Michael Guet in the conference on *Improving access to housing for Roma: good local practices, funding and legislation* (held in Prague, 2-4 February 2011):

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[678] ECSR Conclusions 2003, Volume 2 (n 673), 129; ECSR Conclusions 2003, Volume 1 (n 92), 136-137.
[679] ECSR Conclusions 2005, Volume 1 (n 677), 48-50; ECSR Conclusions 2005, Volume 2 (n 677), 81-8; ECSR Conclusions 2007, Volume 1 (n 677), 59-60; Conclusions 2007, Volume 2 (n 677), 75-77.
[680] For example: "The Committee recalls that the effective right to adequate housing implies its legal protection. This means that tenants or occupiers are given access to affordable and impartial judicial remedies. The present report does not provide information on this issue, to the exception of a case in which the Deputy Parliamentary Ombudsman requested local authorities to improve the conditions of a residential home. Therefore the Committee asks how the right to adequate housing is legally protected, in particular, to what extent judicial and non-judicial remedies are available, also in case of excessive waiting-time for access to housing. It also asks information on existing case law." ECSR Conclusions 2007, Volume 1 (n 677), 57-58.
[681] Michael Guet, Support Team of the Special Representative of the Secretary General for Roma Issues, 'Council of Europe Standards Regarding Roma Housing',
<http://www.romadecade.org/czech_housing_conference> accessed 11 July 2012.

"…For the situation to be in conformity with Article 31 of the Charter, States Parties must:

- adopt the necessary legal, financial and operational means of ensuring steady progress towards achieving the goals laid down by the Charter;
- maintain meaningful statistics on needs, resources and results;
- undertake regular reviews of the impact of the strategies adopted;
- establish a timetable and not defer indefinitely the deadline for achieving the objectives of each stage;
- pay close attention to the impact of the policies adopted on each of the categories of persons concerned, particularly the most vulnerable."[682]

Through its conclusions on national reports the ECSR has established a strong and clear threshold on the right to housing as should be guaranteed by State parties of the Charter. These established standards are also of great help to the ECSR when adopting decisions on the collective complaints. Unfortunately, despite the established strong threshold, in practice the right to housing is not that effectively protected, mainly because of the small number of states that have accepted Article 31 of the Revised Charter. Out of thirty two states that have accepted the Revised Charter,[683] only twelve of them have accepted one or more Article 31 provisions.[684] Out of those twelve states nine have accepted all Article 31 provisions, while three have accepted Article 31(1) and Article 31(2).[685]

In its latest Conclusions from 2011 on the states that have accepted two out of three Article 31 provisions (Andorra, Lithuania and Ukraine), the ECSR decided to defer its conclusions on Andorra regarding both Article 31(1) and 31(2),[686] while it found that the situation in Lithuania and Ukraine is not in conformity with Article 31(1) and Article 31(2).[687] Regarding states that have accepted all of the Article 31 provisions, not even one state has a situation in full conformity with Article 31 requirements, and only

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[682] Ibid.
[683] Member States of the Council of Europe and the European Social Charter, <http://www.coe.int/t/dghl/monitoring/socialcharter/Presentation/Overview_en.asp> accessed 11 August 2012
[684] The information on the ESC web page regarding accepted provisions has been updated in October 2011, so no information is available on the accepted provisions of the Former Yugoslav Republic of Macedonia that ratified the Revised ESC in January 2012.
[685] Finland, France, Italy, Netherlands, Norway, Portugal, Slovenia, Sweden, Turkey have accepted all Article 31 provisions while Andorra, Lithuania and Ukraine have accepted Article 31(1) and 31(2).
[686] ESC (Revised), ECSR Conclusions 2011 (Andorra), Articles 7, 8, 17, 19 and 31 of the Revised Charter (CoE Publishing 2012), 25-30.
[687] ESC (Revised), ECSR Conclusions 2011 (Lithuania) Articles 7, 8, 16, 17, 19, 27 and 31 of the Revised Charter (CoE Publishing 2012), 30-35; ECSR, Conclusions 2011 (Ukraine) Articles 7, 8, 16, 17, 19, 27 and 31 of the Revised Charter (CoE Publishing 2012), 29-35.

Finland and Sweden are in conformity with two provisions (Finland with Article 31(1) and 31(2) and Sweden with Article 31(2) and 31(3)) while regarding one provision (Article 31(3) on Finland and Article 31(1) on Sweden) the ECSR decided to defer its conclusion.[688] All the other states are in non-conformity with one or more provisions of the Article 31.[689] Not only are a lot of states in non-conformity with Article 31 requirements but on numerous occasions has the ECSR decided to defer its conclusions.[690]

Therefore, although the large amount of information that is required from states regarding Article 31 provisions is to be welcomed it seems, just as with the right to health and with the right to a healthy environment, it is exactly this large amount of information that on numerous occasions makes it difficult for the ECSR to make a definite judgment about compliance.[691]

Finally, and even more importantly, there is also a problem with the CoM unwillingness to address recommendations. Up until May 2012 there have not been any CoM recommendations concerning Article 31 provisions. Compliance with Article 31 has been supervised by the ECSR in 2003, 2005, 2007 and 2011 and, as we have seen, the ECSR has found states to be in non-conformity with one or more Article 31 provisions on numerous occasions. Nevertheless, the CoM had not once issued a recommendation requesting states to bring national practice into conformity with the Charter.

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688 ESC (Revised), ECSR Conclusions 2011 (Finland) Articles 7, 8, 16, 17, 19, 27 and 31 of the Revised Charter (CoE Publishing 2012), 27-32; ESC (Revised), ECSR Conclusions 2011 (Sweden) Articles 7, 8, 16, 17, 19, 27 and 31 of the Revised Charter (CoE Publishing 2012), 27-32.

689 ESC (Revised), ECSR Conclusions 2011 (France) Articles 7, 8, 16, 17, 19, 27 and 31 of the Revised Charter (CoE Publishing 2012), 38-49; ESC (Revised), ECSR Conclusions 2011 (Italy) Articles 7, 8, 16, 17, 19, 27 and 31 of the Revised Charter (CoE Publishing 2012), 39-47; ESC (Revised), ECSR Conclusions 2011 (the Netherlands) Articles 7, 8, 16, 17, 19, 27 and 31 of the Revised Charter (CoE Publishing 2012), 31-39; ESC (Revised), 2011 (Norway) Articles 7, 8, 16, 17, 19, 27 and 31 of the Revised Charter (CoE Publishing 2012), 28-32; ESC (Revised), ECSR Conclusions 2011 (Portugal) Articles 7, 8, 16, 17, 19, 27 and 31 of the Revised Charter (CoE Publishing 2012), 34-40; ESC (Revised), ECSR Conclusions 2011 (Slovenia) Articles 7, 8, 16, 17, 19, 27 and 31 of the Revised Charter (CoE Publishing 2012), 30-38; and ESC (Revised), ECSR, Conclusions 2011 (Turkey) Articles 7, 8, 16, 17, 19, 27 and 31 of the Revised Charter (CoE Publishing 2012), 41-48.

690 It deferred its conclusion regarding Andorra (Article 31(1) and 31(2)); Finland (Article 31(3); Netherlands (Article 31(1) and 31(3)); Portugal (Article 31(2) and 31(3)); Sweden (Article 31(1)); and Turkey (Article 31(3)).

691 Khaliq and Churchill, 'The European Convention of Social Rights: putting flesh…' (n 29), 452.

7.6 COLLECTIVE COMPLAINTS ON THE RIGHT TO HOUSING

There have been numerous complaints to date and through them one can also get a good overview of the ECSR's work. More importantly, we can see that the ECSR is now a body whose work is extremely relevant (particularly for the 15 states that have accepted the Collective Complaints procedure) in the protection of economic and social rights in Europe. For the purpose of this chapter collective complaints regarding the right to housing will be divided in accordance with the affected groups. The biggest number of complaints concerned Roma people and Travellers.[692] Although every complaint is different in its nature what most of them have common is the lack of adequate housing for Roma people and the interconnection between their housing problems and with the discrimination towards them.

A complaint brought by the Centre on Housing Rights and Evictions (COHRE) against Italy will be discussed here, since it also represents a response to the fact that the authorities have not ensured a proper follow-up to the similar decision on the merits in respect of the *ERRC v Italy*.[693] In the latter complaint the COHRE claimed a violation of Article E together with Articles 16, 19, 30 and 31. It claimed racial discrimination in the enjoyment of the right to housing by the Roma and Sinti and difficulties for these groups in having access to housing and family benefits; racial discrimination in the protection of family life with regard to census and identification procedure; xenophobic and racist propaganda aggravating social exclusion; and, difficulty in accessing identification documents and unlawful collective expulsion. For the purpose of this chapter only housing issues under Articles 16 and 31 (together with Article E) will be presented in detail.

In the first part of the complaint the COHRE alleged violation of all three paragraphs of Article 31 in conjunction with Article E. When examining the complaint the ECSR stressed that in its decision on the merits in *ERRC v Italy*, the situation in Italy was held to be in breach of Article E taken in conjunction with Article 31(1), 31(2) and 31(3).

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[692] *COHRE v Italy* (n 94); *Centre on Housing Rights and Evictions (COHRE) v France* (63/2010), (2012) 54 E.H.R.R. SE5; *International Centre for the Legal Protection of Human Rights (INTERIGHTS) v Greece* (n 670); *ERRC v Bulgaria* (n 103); *ERRC v Italy* (n 279); *European Roma Rights Centre (ERRC) v Greece* (n 670); *European Roma Rights Centre (ERRC) v Portugal* (61/2010), decision on the merits of 1 July 2010; *European Roma Rights Centre (ERRC) v France* (51/2008), (2010) 51 E.H.R.R. SE1; and *European Roma and Travellers Forum (ERTF) v France* (64/2011), decision on the merits of 1 February 2012.

[693] For that reason, only the later complaint against Italy will be presented *COHRE v Italy* (n 94) and not the Complaint *ERRC v Italy* (n 278).

Furthermore, the ECSR repeated its words expressed in its Reports on Article 31(1), 31(2) and 31(3) and again paid great attention to all Article 31 paragraphs. Regarding Article 31(1), the ECSR stated that a growing number of Roma and Sinti live in socially excluded locations characterised by substandard conditions on the edges of towns, segregated from the rest of the population. Moreover, the ECSR stressed that Italy provided no evidence to demonstrate whether the numerous examples of substandard living conditions of Roma and Sinti have improved rather than deteriorated following the adoption of the "security measures" contested by Italy. As, on the one hand, the measures in question directly targeted these vulnerable groups and, on the other, no adequate steps were taken to take due and positive account of the differences of the population concerned, the ECSR found that situation amounts to stigmatisation which constitutes discriminatory treatment.[694] Therefore, there was a violation of 31(1) together with Article E.

As to the Article 31(2) the ECSR again found a violation, in conjunction with Article E. The ECSR stressed that evictions of Roma and Sinti continue to be carried out in Italy without respecting the dignity of the persons concerned and without alternative accommodation being made available. Also, the respondent Government has not provided credible evidence to refute the claims that Roma have suffered unjustified violence during such evictions and that raids in Roma and Sinti settlements, including by the police, have not systematically been denounced and those responsible for destroying the personal belongings of the inhabitants of the settlements have not always been investigated and, if identified, condemned for their acts.[695] The ECSR not only found a violation, but an aggravated violation of Article 31(2) (in conjunction with Article E) since the criteria for a violation to be aggravated were met.[696]

Regarding Article 31(3) (in conjunction with Article E) again a violation was found. According to the ECSR, and in connection with the situation already established in the complaint No. 27/2004 and in the Report on Article 31(3) concerning Italy from 2007, "..(t)here is no evidence to establish that Italy has taken sustained positive steps to

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694 *COHRE v Italy* (n 94) [58].
695 Ibid [73].
696 "An aggravated violation is constituted when the following criteria are met:
- on the one hand, measures violating human rights specifically targeting and affecting vulnerable groups are taken and; - on the other, public authorities not only are passive and do not take appropriate action against the perpetrators of these violations, but they also contribute to such violence." Ibid [76].

improve the situation."[697] The ECSR stressed that, as to the difficulties in dealing with social housing coherently given the complex distribution of competences between the national level and the regions, ultimate responsibility for policy implementation, involving at a minimum oversight and regulation of local action, lies with the state.

Furthermore, regarding the right to housing the COHRE claimed that Italy also violated Article 16 taken in conjunction with Article E. The ECSR stated that the finding of a violation under Article E taken in conjunction with Article 31 amounts to finding of a violation of Article E taken in conjunction with Article 16 in respect of the right to adequate housing.

The ECSR made a comprehensive analysis of the claimed violations; it took into account its conclusions on the right to housing, its previous decision on the merits, and it also obtained some valuable information from other CoE bodies, like the Court, the CoE Commissioner for Human Rights and the High Commissioner on National Minorities. The monitoring of the Roma situation in Italy (and generally) is not a short term or one-shot process but it is a continuous one. The ECSR is itself aware that the achievement of these rights is a complex process and particularly expensive to resolve[698] and it emphasized that the State party must take measures that allows it to achieve the objectives of the Charter within a reasonable time, with measurable progress and to an extent consistent with the maximum use of available resources.[699] Particularly with regard to the right to housing "implementation of the Charter requires State parties not merely to take legal action but also to make available the resources and introduce the operational procedures necessary to give full effect to the rights specified therein."[700]

By looking at *COHRE v Italy* it can be seen that the situation with the housing of Roma people is always complex, financially demanding and only possible to resolve progressively.

Regarding both of the complaints against Italy concerning housing rights of Roma people the CoM adopted Resolutions. In Resolution ResChS(2006)4[701] on Collective Complaint No. 27/2004 it presented information communicated by the Italian

[697] Ibid [86].
[698] Ibid [25].
[699] Ibid.
[700] Ibid [26].
[701] Resolution ResChS(2006)4 on the Collective complaint No. 27/2004 by the European Roma Rights Centre against Italy (n 278).

delegation during the 960th meeting of the Ministers' Deputies and in Resolution ResChS(2010)8[702] on Collective Complaint No. 58/2009 it stated that it looks forward to Italy reporting that, at the time of the submission of the next report concerning the relevant provisions of the Revised Charter, the situation is in full conformity with the Revised Charter. Unfortunately, the CoM is quite feeble in its assessment and recommendations, even though the ESCR found a violation of the ESC provisions, regarding the same factual situation, in two complaints. Even more, in *COHRE v Italy*, the ECSR has shown that it considers the situation regarding Roma people in Italy rather urgent and serious. This is visible from the fact that the ECSR gave its decision only a year after the complaint was registered and that it found an aggravated violation of Article 31(2). [703] For these reasons it is rather surprisingly that the CoM, even though it acted speedily and issued a Resolution on 21 October 2010 (4 months after the decision on the merits) was so lenient. Unfortunately, it does not seem likely that these weak recommendations on the part of the CoM will initiate action on the part of the Italian state. Furthermore, the CoM's second Resolution adds nothing substantive to the language of the Resolution that it adopted in response to the Committee's findings in *ERRC v Italy*. This is despite the clear failure of Italy to address the violations determined by the ECSR.[704]

As to the right to housing of groups other than the Roma, *COHRE v Croatia* will be analysed here.[705] The situation complained of by the COHRE has numerous similarities with the *Blečić* case and unlike the Court, the ECSR found numerous shortcomings in the behaviour of Croatian authorities.

The COHRE complaint concerns the problem of loss of special occupancy rights of ethnic Serbs and other minorities which occurred during 1991-1995 and after the war in Croatia. The conflict in the former Yugoslavia created a massive population displacement. During the war, on the basis of Article 99 of the Housing Act, proceedings for cancellation of occupancy rights were instituted against persons with specially-protected tenancies under the social ownership system who did not remain in

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[702] Resolution CM/ResChS(2010)8 on the Collective complaint No. 58/2009 by the Centre on Housing Rights and Evictions (COHRE) against Italy (n 278).
[703] The complaint was registered on 29 May 2009 and the Committee adopted its decision on the merits on 6 July 2010.
[704] Nolan, '"Aggravated violations", Roma housing rights…' (n 31), 359.
[705] *COHRE v Croatia* (n 132). This is not the only non-Roma housing case. Others include *International Movement ATD Fourth World v France* (33/2006), (2009) 48 E.H.R.R. SE6 and *European Federation of National Organisations Working with Homeless (FEANTSA) v France* (n 93).

occupation of their flats, where such persons could not provide a suitable legal justification for their absence.[706] In contrast, persons who remained in occupation of their socially owned flats during the conflict were granted the right in certain circumstances to acquire legal ownership of their flats. From 1991 until 2008 there have been numerous national and international provisions and agreements that dealt with the problem of displacement and possible return of the ethnic Serbs to Croatia.[707]

First, it needs to be pointed out that the Government maintained that the issues raised by the complainant organisation fall outside of the temporal jurisdiction of the ECSR (just as it did in the *Blečić* case before the Grand Chamber), as they concern matters which took place before Croatia ratified the ESC on 1 March 2003.

On the *ratione temporis* issue the ECSR referred to the judgments of the Grand Chamber of the ECHR in cases of *Blečić* and *Šilih v Slovenia*.[708] However, unlike the Court's Grand Chamber in *Blečić* case, the ECSR considered that the special nature of the rights at issue can be relevant in assessing whether a situation can be said to be on-going, as accepted by the Grand Chamber in *Šilih*.[709] In this context, the nature of the protection conferred by Article 16 of the Charter is relevant, particularly its focus on securing effective and continuing protection of family life. Turning to the application of these principles to the issues at stake in the present complaint, the ECSR recalled that, in its decision on admissibility,[710] it held that the heart of the complaint concerned alleged violations of the Charter which has continuing and persistent effects at the time it was lodged, which post-dated the ratification by Croatia of the Charter in 2003. Therefore, the ECSR found this complaint to be within its temporal jurisdiction.

Furthermore, in the substantive part of the complaint, the COHRE alleged the breach of Article 16 in four respects. First, the COHRE argued that the requirement stating that to qualify for housing care the applicants had to express a desire to return to Croatia, constituted an unjustified limitation on the right of displaced families to obtain redress. Secondly, it stated that the housing and security of tenure provided to returning families by the Government under the housing care programmes could not be considered to constitute the full restitution and/or compensation to which displaced

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[706] As we have seen in the *Blečić* case (n 651).
[707] *COHRE v Croatia* (n 132) [7]-[22].
[708] App no 71463/01 (ECtHR, 9 April 2009).
[709] Ibid, [147]. (Unlike in *Blečić* case (n 653).
[710] *COHRE v Croatia* (decision on admissibility from 30 March 2009) (n 132).

families should be entitled by right. Thirdly, the COHRE stated that the implementation of housing care programmes is not adequate, on the basis that housing provided under the programme is of inadequate standard, the processing of applications is subject to long delays, and considerable uncertainty exists as to when housing will be made available to displaced families. Fourthly, according to the COHRE, the implementation of the housing programme discriminates against ethnic Serbs, who constitute the bulk of the displaced families.

As to the first issue invoked by the COHRE the ECSR considered that Article 16 of the Charter imposes obligations upon the Government of Croatia only in respect of those families who have expressed their clear wish to return to Croatia, or those for whom the lack of an effective and meaningful offer of housing and other forms of economic, legal or social protection has constituted an obstacle to return. Regarding the claim that the redress provided does not take the form of a legal entitlement of restitution or compensation, the ECSR found that COHRE's allegation does not fall within the material scope of Article 16.

Turning to the adequacy of the measures implemented by the Government under its housing programme for displaced persons, in respect of the adequacy of the housing and tenure provided to families who have returned or wish to return to Croatia, the ECSR held that the COHRE has not produced sufficient evidence to establish that the quality of housing provided under the housing programme does not fulfil Article 16 requirements.

Finally, on the basis of the information provided by the parties and the sources such as the European Commission, the UN Refugee Agency (UNHCR) and the Organisation for Co-operation and Security in Europe (OSCE) the ESCR assessed all the information and concluded that the housing programme has not been implemented by Croatian authorities within a reasonable timeframe. Therefore, the ECSR found a violation of Article 16 read in light of the non-discrimination clause on the basis of the failure to implement the housing programme within a reasonable timeframe and a violation of Article 16 read in light of the non-discrimination clause on account of the failure to take into account the heightened vulnerabilities of many displaced families, and of ethnic Serb families in particular.

As we can see, the ECSR paid particular attention to the fact that displaced families were vulnerable, which the Court in the *Blečić* case failed to do, as well as not considering this complaint to be outside its temporal jurisdiction although Croatia ratified the ESCR 6 years after its ratification of the Convention.

The ECSR is, unlike the Court, not ambiguous in reaching its conclusions on the housing issues and is aware of the problematic issues that lie under the concept of housing rights. That is exactly the reason why again in the *COHRE v Croatia* decision it stressed that "when the achievement of one of the rights in question is exceptionally complex and particularly expensive to resolve, a State party must take measures that allows it to achieve the objectives of the Charter within a reasonable time, with measurable progress and to an extent consistent with the maximum use of available resources. States parties must be particularly mindful of the impact their choices will have for groups with heightened vulnerabilities."[711]

There are numerous other collective complaints on the right to housing, but for the purpose of analysing the working methods of the ECSR, an overview of the two above discussed decisions is sufficient. Another reason for looking at those complaints is that they have numerous similarities with the cases brought before the Court,[712] particularly given that they concern the same vulnerable groups and their housing problems, and are part of the group of cases where the Court has shown greatest ambiguity and uncertainty in its reasoning and decision making.

As to the supervision of the execution of the decision on *COHRE v Croatia*, the CoM on 5 May 2011 adopted a Resolution ResChS(2011)6.[713] It noted the statement made by the Croatian government and the information that it had communicated on the follow-up to the decision of the ECSR. The CoM welcomed the measures that the Croatian government had already taken and the authorities' commitment to bring the situation into conformity with the Charter. Finally, it addressed its hope that Croatia will report in the future that the situation has been brought into full conformity. Unfortunately, just as

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711 *COHRE v Croatia* (n 132) [65].

712 Regarding Roma people*: Beard v United Kingdom* (n 633); *Lee v United Kingdom* (n 634); *Smith (Jane) v United Kingdom* (n 634); *Kay v United Kingdom* (n 632); *Buckley v United Kingdom* (n 611); *Chapman v United Kingdom* (n 11); *Connors v United Kingdom* (n 608); *Coster v United Kingdom* (n 623); and regarding special occupancy rights: *Paulić v Croatia* (n 213); *Bjedov v Croatia* (n 657) and *Blečić v Croatia* (n 651).

713 Resolution CM/ResChS(2011)6 on the Collective complaint No. 52/2008 by the Centre on Housing Rights and Evictions (COHRE) against Croatia (Adopted by the Committee of Ministers on 5 May 2011, at the 1113th meeting of the Ministers' Deputies).

with all the other CoM Resolutions presented in this thesis, the CoM was again not placing any pressure on Croatia, but it only welcomed the measures already taken.

7.7 CONCLUSION

What we have seen in this chapter is that the right to adequate housing is an area in which the Court has shown great ambiguity, uncertainty and even inconsistency. However, we have also seen that this is clearly a right that can be placed under the traditional definition of economic and social rights, just as the ECSR has stressed on numerous occasions. Even more, under the ESC there are a number of provisions that directly or indirectly deal with the right to housing whereas under the Convention adequate housing as such can only be indirectly claimed and in most cases those applications will be unsuccessful. In my opinion, instead of broadening the scope of the Convention and looking for the ways to introduce the right to housing under the Convention, this right should be considered as a traditional economic and social right which is better left for the ECSR to deal with it.

Despite the small number of states that have accepted the Collective Complaints procedure what is visible from the analysis so far is that the number of complaints regarding the violation of the right to housing is rather high. The CoE bodies, like the Parliamentary Assembly, should place more pressure on states to ratify the Collective Complaints Protocol if it aims for a better protection of economic and social rights as the right to adequate housing is. Unfortunately, another problem is that the CoM very rarely places pressure on states to comply with the ESCR decisions and reports. Even when it does so, that pressure is often pretty weak. The CoE bodies should also urge the CoM to make more recommendations.

As to the Reporting procedure, we have seen there are also three particularly problematic issues, the small number of states that have accepted Article 31 of the Revised Charter, the number of information the ECSR requires from states making it difficult for it to reach a final conclusion on compliance, and the lack of CoM recommendations.

However, on most occasions states are making an effort to bring a situation in conformity with the ECSR decisions, but that is a long and demanding process that concerns a large number of people, it usually requires the state to change legislation, and introduce numerous general measures. Therefore, it is better placed for protection as a collective rather than as an individual right.[714]

7.8 CONCLUSION ON THE CHAPTERS IV, V, VI AND VII OF THE THESIS

We have seen through the last four chapters that on certain occasions the Court has entered the socio-economic sphere when protecting civil and political rights and that it has often shown ambiguity and inconsistency when it comes to adopting judgments that have significant socio-economic elements. Despite the theoretical idea that all rights are indivisible, interconnected and interrelated, in Europe the protection of economic and social rights is left for the ECSR that can adopt only non-binding decisions, while the protection of civil and political rights is left to the Court that can deliver binding judgments. As to the detention conditions and healthcare in prisons, those issues are successfully dealt by the CPT which requires states to bring the situation in their detention centres into conformity with established standards and, although it requires from states to take measures immediately, it is aware that full compliance can only be achieved progressively.

Several groups of rights have been analysed under the previous chapters. What we have seen is that when it comes to detention conditions and the provision of healthcare in prisons the Court has mainly examined those issues under Article 3. Here, the Court has shown consistency and it found violations of Article 3 whenever the state failed to provide detention conditions and healthcare of certain, adequate standards. However,

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[714] For more on individiual and collective rights and differences among them see Yalim Eralp 'Individual Rights versus Collective Rights' (2010) 18 Global Political Trends Center 1; Stanford Encyclopedia of Philosophy, Group Rights <http://plato.stanford.edu/entries/rights-group/> accessed 23 December 2012; Douglas Sanders 'Collective Rights' (1991)13 Hum. Rts. Q. 368; Robert A. Dubault 'The ADA and the NLTRA: Balancing Individual and Collective Rights' (1994-1995) 70 Ind. L.J. 1271 (1994-1995); Michael Hartney 'Some Confusion Concerning Collective Rights' (1991) 4 Can. J. L. & Jurisprudence 293; Yoram Dinstein 'Collective Human Rights of Peoples and Minorities' (1976) 25 Int'l & Comp. L.Q. 102; Lesley A. Jacobs 'Bridging the Gap Between Individual and Collective Rights With the Idea of Integrity' (1991) 4 Can. J. L. & Jurisprudence 375; and Leslie Green 'Two Views on Collective Rights' (1991) 4 Can. J. L. & Jurisprudence 315.

this is not something originally intended to be granted under Article 3 of the Convention. The Court has started interpreting Article 3 in such manner within the last 12 years and numerous applications regarding those issues have come before the Court. Numerous complaints, as we have seen, concern the same or similar detention centres, and after the Court finds a violation (mainly basing its decision on a CPT findings), the CoM supervises the execution for years. The idea I tried to elaborate through the chapter IV is that one way to deal with unacceptable detention conditions might be through the CPT's work which would allow the Court to deal with more serious and individualistic cases of Article 3 violations and the CoM to focus on the execution of judgments that objectively can be executed within a more reasonable timeframe in order to secure individual human rights protection under Article 3. By doing so, the CPT's workload would not increase, at least not significantly, since as has been shown, the CPT regularly visits places of detention in Member States of the CoE and continuously examines improvements of the detention conditions. On the other side, the workload of the Court and the CoM would significantly decrease without endangering the protection of rights of individuals under Article 3 of the Convention.

Within the preceding three chapters the right to a healthy environment, the right to health and the right to housing have been presented. All these rights are, whether explicitly or implicitly, guaranteed under the ESC. When it comes to the right to a healthy environment, here again the Court has shown its willingness to enter this sphere of human rights protection and again, this has been shown not to be the best solution. The situation concerning the right to a healthy environment is not as clear-cut as the detention condition cases since the Court allowed certain margin of appreciation to states thereby creating even more uncertainty for states regarding their obligations under the Convention. As to the right to healthcare in general and the right to adequate housing the Court has shown much more reluctance when it came to guaranteeing these rights, however it gave clear indications it might enter this spheres of human rights protection. In my opinion, neither the right to a healthy environment, nor the right to adequate housing or to the healthcare in general should be protected under the Convention.

Numerous problematic issues the ESC system is facing cannot be ignored, both under the Reporting and under the Collective Complaints procedure. There are a small number of states that have ratified the Collective Complaints Protocol, states are not

obliged to accept all the ESC provisions, and the great amount of information the ECSR requires from states under the Reporting procedure often makes it hard for the ECSR to make a judgment about states compliance with their obligations. Furthermore, another problem of the Reporting system is the fact that a single round of one report may take for almost a decade before a final conclusion had been reached. After the state report is considered by the ECSR its conclusions are then subjected to the scrutiny by the Governmental Committee which then sends its report to the CoM to finalise the process.[715]

Further deficiency of the ESC system is the CoM supervision of both ECSR decisions and conclusions where it is quite often reluctant to address recommendations and even when it does, those recommendations are quite bland. [716] The role played by the CoM should either be decreased or it should be obliged to place more pressure on states when either the Court or the ECSR find there has been a violation of the Convention or of the ESCR. The CoE bodies should urge the CoM to issue recommendations every time after the ECSR finds the state to be in non-compliance with the ESC provisions and to make stronger resolutions. Issuing recommendations to states as well as clearer and stronger resolutions, after the ECSR has found that the state is not in compliance with certain ESC provision should become common practice of the CoM. As R. Churchill and U. Khaliq wrote regarding non-issuing of recommendations by the CoM under the Collective Complaints system:

"If this trend continues, it will serve only to discredit the system and discourage complaints because complainants will feel that there is little point in utilizing the system if a finding of non-compliance by the ECSR will not be endorsed and a recommendation addressed to the defendant state by the Committee of Ministers. More fundamentally, it is undesirable that the Committee of Ministers, a political body, should have any role to play in what is, or at least ought to be, a quasi-judicial process."[717]

Unfortunately, the situation with the CoM is quite similar under the Convention system.[718] Both under the Convention and under the Charter system the CoM rarely

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[715] For a detailed analysis of the timing and the role of all the Committees within the Reporting system, see Alston 'Assessing the Strength and Weaknesses…' (n 263).
[716] For further critiques of the ESC supervisory systems see also Alston 'Assessing the Strength and Weaknesses…' (n 263); Khaliq and Churchill, 'The European Committee of Social Rights: putting flesh…' (n 29); and Andrew Dremczewski 'Fact-finding as Part of Effective Implementation: The Strasbourg Experience' in Anne F. Bayefsky (ed) *The U.N. Human Rights Treaty System in the 21st Century* (Kluwer Law International 2000).
[717] Churchill and Khaliq, 'The Collective Complaints System…' (n 29).
[718] See chapter III (section 3.4.).

places any pressure on the states, instead it accepts the national reports, welcomes the measures taken and asks states to adopt more measures. Its findings are very brief, compressed and bland towards states.

Despite the problematic issues under the ESC system it needs to be pointed out that the role of the Court is not to protect all human rights, but only the civil and political rights guaranteed under the Convention.[719] If there is a goal within the CoE for giving economic and social rights better protection, the CoE bodies should focus more on improving the ESC system of protection and urge states to ratify the Collective Complaints Protocol and accept more ESC provisions. As to the detention conditions and a right to a healthcare in prisons, we have seen that the CPT can provide equally good protection of these rights although non-judicial. The solution for better protection of the rights discussed in chapters IV, V, VI and VII is not in reading in more rights under the Convention, because imposing new rights under the Convention can be counter-productive. Not only can it deteriorate the good situation there is at the moment regarding the states' compliance with the judgments, but it can also bring into question the legitimacy of the Court. By deciding whether a violation of the above stated rights occurred on a case-by-case basis the Court is often also being inconsistent and creates uncertainty among states regarding their obligations under the Convention. For that reasons, in the following chapter the inconsistency in the Court's decision-making will be discussed. Emphasis will be on the Court's jurisprudence as discussed in chapters IV, V, VI and VII. Finally, chapter IX will question and analyse another interrelated issue: the legitimacy of the Court and its work. The biggest problem that will be addressed is whether the Court's legitimacy is threatened because of its reading in new rights, rights with significant socio-economic elements, particularly by doing that in an inconsistent manner.

[719] Except from the Right to education (Article 2 of Protocol No. 1) and the Right to protection of property (Article 1 of Protocol No.1).

CHAPTER VIII

THE INCONSISTENCY OF THE COURT'S JUDGMENTS

8.1 INTRODUCTION

We have seen from the jurisprudence analysed in the previous chapters the practical problems that arise when judges of the Court deliver judgments with significant socio-economic elements. Another problem of such judgments is the inconsistency in the decision-making. Inconsistency is one of the issues raised in the research hypothesis and it will be discussed here. The Court is not bound by its precedents as courts in a common law system are, but for reasons of legal certainty it is necessary for the Court to be consistent and follow its precedents, mainly for the states to be able to regulate their behaviour in accordance with the human rights standards developed by the Court.

According to Judge Popović, the use of precedent in the Court's practice represents the second pillar of development leading to the emergence of the European human rights law. The first pillar of the whole process is the Court's creativity and that creativity would have been unbalanced without the role played by precedent.[720] It is not easy to find out what the Court's position towards the binding force of precedent really is. However, the absence of a properly formulated doctrine does not necessarily mean the absence of a corresponding practice of the Court.[721] The Court's principal position on the binding force of precedent can be distilled from its case-law.

"The Court is not bound by its previous judgments. However, it usually follows and applies its own precedents, such a course being in the interests of legal certainty and the orderly development of the Convention case-law. Nevertheless, this would not prevent the Court from departing from an earlier decision if it was persuaded that there were cogent reasons for doing so."[722]

The Court generally denies the binding force of previous judgements, while at the same time it follows its own judgments for the sake of legal certainty. In *Chapman v United*

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[720] Popović, *The Emergence of the European Human Rights Law*… (n 12), 62. See also Alastair Mowbray, 'An examination of the European Court's approach to overruling its previous case-law' (2009) 9(2) H.R.L.Rev. 179.
[721] Ibid, 66.
[722] *Cossey v United Kingdom* (n 192), [35].

Kingdom the Court invoked interests of legal certainty, foreseeability, and equality before the law as reasons for not departing (without good reasons) from precedents laid down in previous cases.[723]

Three separate grounds of justification for overruling the Court's previous case-law have been detected in the case-law: uncertainty in the existing jurisprudence, rapidly increasing numbers of complaints to the Court concerning a specific right guaranteed by the Convention, and the application of the living instrument doctrine to the interpretation of the Convention.[724] The justification invoked most frequently by the Court is the duty to ensure that the Convention is interpreted in an evolutionary manner that reflects contemporary standards in accordance with the living instrument doctrine.[725] Therefore, the Court will depart from its previous case-law if the heightened human rights standards require it to do so, and that will be the case if there is a consensus among states about those standards. However, the problem arises when the Court departs from its case-law without providing a good explanation, when there are no cogent reasons or consensus among states for doing so, or when it decides to take a step backward in human rights protection. I begin this chapter by looking briefly at the Court's case-law in general, and then go on to consider the judgments with significant socio-economic elements discussed in the previous chapters.

8.2 PRACTICAL EXAMPLES OF THE COURT'S INCONSISTENCY

A general example of the Court's inconsistency is *Christine Goodwin v United Kingdom*,[726] where the issue of making changes in the registration of births and marriages and in British National Insurance systems to recognise the post-operative legal status of transsexuals was raised. The Court found that the respondent Government could no longer claim that the matter fell within their margin of appreciation. It concluded that the fair balance that was inherent in the Convention now tilted decisively in favour of the applicant and that there had been a failure to respect her right to private life in breach of Article 8. The Court simply changed the existing case-law under the aegis of Article 8 right respect for private life without even invoking European or international

723 *Chapman v United Kingdom* (n 11) [70].
724 Mowbray, 'An examination of the European Court's approach…' (n 720), 200-201.
725 Ibid, 197-198.
726 *Christine Goodwin v United Kingdom* (n 81).

consensus but only an international trend.[727] Furthermore, the Court invoked three principles of the rule of law: legal certainty, foreseeability, and equality, and yet in this case it did not apply any of those principles.[728] It seems that the Court decided to depart from its previous case-law[729] and expand the scope of the right to private life, and it did so without providing legal reasons for such behaviour and without looking for consensus among states.[730]

Further cases can also be mentioned: such as *Banković and Others v Belgium and Others*,[731] where the Court used a restrictive interpretation of the Convention's provisions after years of rejecting such approach, and *Al-Skeini v United Kingdom*,[732] where it returned to the activist approach, both of which were decided without providing proper justification for such decision-making. Banković was a citizen of the Federal Republic of Yugoslavia whose daughter was killed in a NATO air attack on a Serbian television station. He complained that the attack had breached several Convention provisions. The Belgian government, along with other NATO governments, contended that as Banković was not within any of their respective jurisdictions the complaint did not come within Article 1 of the Convention. The Grand Chamber held that there was no jurisdictional link between Banković and the NATO States. It stated that under Article 1 the Convention was subject to territorial limits in terms of jurisdiction and it was only in very exceptional cases that acts performed outside the territory of the contracting states, or taking effect beyond their territories, would amount to an exercise of jurisdiction for the purposes of Article 1; however, the Grand Chamber held this had not occurred in *Banković* case, and therefore the complaint did not fulfil the jurisdictional requirements of Article 1.[733]

The next case that raised the issue of extraterritorial jurisdiction was *Al-Skeini*. Here the judges again pointed out that a state's jurisdictional competence under Article 1 was primarily territorial: acts performed, or producing effects, outside their territories could constitute an exercise of jurisdiction within the meaning of Article 1 only in exceptional

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727 Ibid [84].
728 Ibid [74].
729 *Rees v United Kingdom* (n 426); *Cossey v United Kingdom* (n 192).
730 Also see *Frette v France* (n 199).
731 *Banković and Others v Belgium and Others* (2007) 44 E.H.R.R. SE5 (GC Decision).
732 *Al-Skeini v United Kingdom* (2011) 53 E.H.R.R. 18.
733 For more detailed analysis of *Banković* see Erik Roxtrom, Mark Gibney and Terje Einarse 'The NATO bombing case (Bankovic et al. v Belgium et al.) and the limits of Western human rights protection' (2005) 23:55 Boston University International Law Journal 55 and Matthew Happold '*Bankovic v Belgium* and the territorial scope of the European Convention on Human Rights' (2003) 3 (1) H.R.L.R. 77.

cases. In the instant case, following the removal from power of the Ba'ath regime and until the accession of the interim government, the UK, together with the United States, had assumed the exercise of some of the public powers normally exercised by a sovereign government in Iraq. In those exceptional circumstances, the UK, through its soldiers engaged in security operations in Basrah, exercised authority and control over individuals killed in the course of such security operations, so as to establish a jurisdictional link between the deceased and the UK for the purposes of Article 1.

The *Al-Skeini* judgment was welcomed among the scholars and human rights lawyers, although to some it raised certain questions related to the Court's decision-making principles.[734] The Grand Chamber in *Al-Skeini* did point out that the exceptional circumstances of the case unlike those in *Banković,* fulfilled the criteria necessary for the extraterritorial acts to be considered as under state's jurisdiction as required by Article 1. However, these two cases represent inconsistency in the Court's reasoning, especially *Banković* which represents a step backwards in the Court's interpretation of the Convention particularly when looked at from the perspective of its earlier reasoning in *Cyprus v Turkey* and *Loizidou v Turkey.*[735] Let me now turn to the problem of inconsistency in judgments with significant socio-economic elements.

8.2.1 THE COURT'S INCONSISTENCY AND JUDGMENTS CONCERNING DETENTION CONDITIONS AND HEALTHCARE IN PRISONS, HEALTHCARE IN GENERAL, AND HEALTHCARE FOR ASYLUM SEEKERS

First, judgments concerning detention conditions and healthcare in prisons where not much inconsistency can be found will be discussed. As already mentioned in chapter IV, the main problem with those judgments is that they usually require states to institute numerous general measures and their execution is a long and financially demanding process.

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[734] For further comments on *Al-Skeini*, see Max Schaefer 'Al-Skeini and the elusive parameters of extraterritorial jurisdiction' (2011) 5 E.H.R.L.R. 566; and Joanne Williams, 'Al Skeini: A flawed interpretation of Bankovic' (2005) 3(4) Wisconsin International Law Journal 687.
[735] *Cyprus v Turkey* (1982) 4 E.H.R.R. 482 and *Loizidou v Turkey* (1995) 20 E.H.R.R. 99.

Despite the Court's overall consistency there is one case that can be mentioned here, *Stojanović v Serbia*,[736] where the Court, after years of applying strict criteria and standards when deciding whether a violation of Article 3 occurred due to unsatisfactory detention conditions or healthcare in prisons, delivered a rather unusual decision. In this particular case the applicant was examined by a prison dentist in 2004, who confirmed his complete toothlessness and proposed that the applicant should be provided with dentures. The applicant could not afford to pay the amount necessary unless he paid in instalments corresponding to his monthly prison salary. It took more than three years before he had been provided with the dentures during which time he could not eat any solid food. The Court struck out this part of the application, on the ground that the applicant had eventually been provided with the relevant and necessary medical care.[737] This reasoning is contrary to Court's judgments concerning detention conditions and healthcare in prisons.[738] Judge Zagrebelsky dissented on this particular issue, claiming that a violation of Article 3 had occurred by stating:

"The Court, to my knowledge, has never found the matter to have been resolved in a case under Article 3 of the Convention such as the present one…

I am unable to see how it can be said that the issue of the case has been resolved by the sole fact that a possible violation of Article 3 has finally ended and I am deeply worried by a judgment that sets such a precedent in the Court's Article 3 case-law. Moreover one can easily conceive possible developments and applications of this new precedent, capable of spreading across a broader range of Convention violations such as serious violations of Article 3, or of Article 5 and so forth."[739]

However, in relation to detention conditions and healthcare in prisons, the Court has generally been consistent in finding violations of Article 3, and this judgment did not establish a precedent.

As we can see, inconsistency is not common with regard to detention conditions and healthcare in prisons. One of the reasons for this is the clear standards established by the CPT which the Court, as seen in chapter IV, is also applying in its decision-making. Furthermore, Article 3 does not allow any margin of appreciation to be attributed to states and there is no second paragraph of this article that would allow exceptions. Therefore, once the Court started guaranteeing satisfactory detention conditions and the

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[736] *Stojanović v Serbia* App no 34425/04 (ECtHR 19 May 2009).
[737] Ibid [76]-[81].
[738] See *Price v United Kingdom* (n 331).
[739] *Stojanović v Serbia* (n 736), Partly dissenting opinion of Judge Zagrebelsky.

right to healthcare of a certain degree in detention, it could not depart from those established standards by using the margin of appreciation.

Regarding the right to healthcare in general, as guaranteed by the Court, we have seen in chapter VI that this is an area where the Court decided to refrain from entering this socio-economic sphere of human rights protection, but left the issue of healthcare to the ECSR. When it is not providing healthcare of detainees, the Court generally adopts an approach of not dealing with providing healthcare in general under the Convention. However, in one of its most recent cases, *Georgel and Georgeta Stoicescu v Romania*,[740] the Court decided to depart from its previous case-law and found a state to be in violation of Article 8 for not introducing general and preventive healthcare measures.[741] It will be interesting to see whether the Court will continue to declare how a state should allocate its national resources in the healthcare area. This is not advisable, since it is an area of human rights protection clearly not envisaged by the Convention but it is dealt with under the ESC.

Furthermore, another pertinent issue for this section relates to cases concerning the issue of healthcare and deportation. In *N. v United Kingdom*, the Court acknowledged that financial issues were an important factor when matters of asylum were raised. In this judgment the Grand Chamber stated that in the absence of very exceptional circumstances, the deportation of an asylum seeker who was suffering from AIDS to Uganda, where access to medical treatment and facilities was problematic, would not breach Article 3 of the Convention.[742] Unlike in *N.,* in *D. v United Kingdom*[743] the Court decided that deportation of the applicant to St. Kitts would have serious detrimental effects on his health, as he was also suffering from AIDS, and therefore the implementation of the national decision to remove the applicant to St Kitts would violate Article 3 of the Convention. The facts of these cases are not different on any important or significant level and yet the Court reached different conclusions.

The two points of *N.* judgment are particularly interesting. First, the Court invoked financial burden this judgment might place on the state that is already in a difficult economic situation. If we look at the previous practice of the Court, where it

[740] *Georgel and Georgeta Stoicescu v Romania* (n 232).
[741] See chapter VI, Section 6.2.4.
[742] In some ways, this judgment looks similar to the *Banković* decision (n 731) where the Court also invoked exceptional reasons, thereby allowing itself discrepancies in decision-making.
[743] *D. v United Kingdom* (n 135).

emphasises the absolute nature of Article 3 and the irrelevance of the financial burden, we compare that with the Court's decision in *N.* where it departed from this view. Secondly, the *N.* case also shows us that when the Court finds it appropriate, it stresses the difference between economic, social, civil and political rights;[744] while on other occasions, it points out the interconnection between those two sets of rights and its integrated approach to human rights protection.[745]

In conclusion, despite the small amount of inconsistency in the healthcare and detention condition cases, it is again apparent that whenever the Court does not have clearly defined standards, inconsistency can be found in its decisions.

8.2.2 THE COURT'S INCONSISTENCY AND JUDGMENTS CONCERNING THE RIGHT TO A HEALTHY ENVIRONMENT

As seen in chapter V, the Court has increasingly examined complaints in which individuals have argued that a breach of their Convention rights has resulted from adverse environmental factors. Due to the fact that a healthy environment *per se* is not protected under the Convention, the Court decided environmental cases on a case-by-case basis, and it did not set out clear standards or guidelines, as to when and why the state's margin of appreciation will be wide, and when on the other hand it will be narrow.

The first case to which attention will be given is *Hatton*, a case that has been decided by both the Chamber and Grand Chamber, and where both chambers reached different conclusions. The Chamber held that the state did have a duty to take reasonable and appropriate steps to uphold the residents' rights. According to the Chamber, the UK Government had failed to strike a balance between competing interests: the UK's economic well-being, and the applicants' effective enjoyment of their right to respect for their homes and their private and family lives. Despite the margin of appreciation left to the respondent State, the Court found that there had been a violation of Article 8.[746]

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[744] *N. v United Kingdom* (n 568) [43] and [44].
[745] *Airey v Ireland* (n 3) [26].
[746] *Hatton and Others v United Kingdom* (n 204).

However, this judgment was not reached unanimously and two judges disagreed with the majority's finding that there had been a violation of Article 8.[747]

Hatton was referred to the Grand Chamber, which held, dismissing the Article 8 claim, that although a person who was significantly affected by noise or pollution could bring a claim under Article 8, states had a margin of appreciation that required them to weigh all the competing interests involved. According to the Grand Chamber, no violation of Article 8 had occurred and in the instant case, and that the UK had acted within the scope of its margin of appreciation.

This decision was criticised by Judges Costa, Ress, Türmen, Zupančič and Steiner, who issued a joint dissenting opinion where they invoked the current stage of development of the pertinent case-law regarding the guarantees of the right to live in a healthy environment under Article 8. They also emphasized that the Convention is a living instrument and therefore the Court adopts an evolutive interpretation of various Convention requirements that it has gradually extended in order to raise the level of protection afforded to the rights and freedoms guaranteed by the Convention.[748]

"The Grand Chamber's judgment in the present case, in so far as it concludes, contrary to the Chamber's judgment of October 2, 2001, that there was no violation of Article 8, seems to us to deviate from the above developments in the case law and even to take a step backwards. It gives precedence to economic considerations over basic health conditions in qualifying the applicants' "sensitivity to noise" as that of a small minority of people."[749]

The differences in the opinions of the judges of both the Chamber and the Grand Chamber in this judgment are a clear sign of their uncertainty when delivering judgments where a claim relies upon a right not guaranteed under the Convention, and at the same time that right has strong economic implications for states. Interestingly, even the dissenting judges emphasized the Court's inconsistency in this area.[750]

Finding a violation of Article 8 due to environmental hazards is compatible with the use of both the living instrument doctrine and the doctrine of effectiveness where the Court wants to make sure that the protection of the Convention rights is not theoretical or

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[747] Ibid. Partly dissenting opinion of Judge Greve and dissenting opinion of Judge Brian Kerr.
[748] *Hatton and Others v United Kingdom* (GC judgment) (n 204), Joint dissenting opinion of Judges Costa, Ress, Türmen, Zupančič and Steiner [15].
[749] Ibid [17].
[750] Ibid [14].

illusory, but practical and effective in accordance with the present day conditions. However, the use of these doctrines will also depend on the width of the margin of appreciation attributed to states and the consequences that a judgment will have on states, particularly on their finances. Finding a violation of Article 8 in the *Lopez Ostra* case had fewer consequences, particularly financial ones, for Spain than the decision in the *Hatton* case would have had for the UK.

In the later cases, *Fadeyeva v Russia,*[751] *Giacomelli v Italy,*[752] and *Tatar v Romania*[753] the Court found a violation of Article 8 due to the impact the state's actions or inactions had on the applicants' environment. Therefore, the Court, when striking a fair balance, decided to narrow the margin of appreciation afforded to states and found that it was their obligation to provide the applicants with a healthy environment. Nevertheless, the situation with the right to the healthy environment is still not clear, as the Court decides on a case-by-case basis, sometimes narrowing and sometimes widening the state's margin of appreciation, all without clear standards and guidelines.

As to the cases regarding a healthy environment in relation to Article 2, they are not numerous, nor are there inconsistencies, since the Court was determined in establishing Article 2 violations where the state failed to fulfil its positive obligations to protect lives from environmental hazards.

8.2.3 THE COURT'S INCONSISTENCY AND JUDGMENTS CONCERNING THE RIGHT TO ADEQUATE HOUSING

Finally, the inconsistency of the Court's judgments in relation to the right to adequate housing will be discussed. In chapter VII, the housing cases were divided into three groups, the first group consisted of cases where state agents were directly involved in the destruction of and eviction from home. The second group of cases involved situations where actions of state bodies caused individuals to either lose or to move from their homes, while the third group of cases analysed was primarily concerned with the content of the state positive obligations regarding adequate housing.

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751 (n 454).
752 (n 455).
753 (n 456).

Not much attention will be given to the first group of cases where the Court has been consistent in finding a state responsible for the alleged violations.

One of the cases from the second group of cases that can be mentioned here is *Blečić v Croatia*. [754] It represents an interesting case for numerous reasons but mainly because here the Court showed its lack of consistency on several levels.

First, the Chamber declared that no violation of the Article 8 right to respect for home arose and allowed the state a wide margin of appreciation. The judges found no violation of Article 8 since satisfying housing needs had to be balanced against Ms Blečić's right to respect for her home. In the context of Article 8 rights, the Court stressed that domestic authorities enjoyed a wide margin of appreciation in implementing social and economic policies necessary to secure social justice and public benefit. It is important to point out that in the *Blečić* case the applicant was actually the sole holder of a specially protected tenancy on a flat. The state terminated her tenancy on the ground that she had been absent for more than six months without justified reason, and the national courts had found that the war in Croatia did not justify her absence. The Chamber found the national decisions to be justified and necessary in a democratic society, justifying it by reference to the housing needs of other citizens. However, when the case was referred to the Grand Chamber it found the case to be inadmissible, and held that the Court had no jurisdiction to consider the merits of the case.[755]

In the later and similar housing case, *Paulić v Croatia*[756] the Court did find a violation of the applicant's Article 8 right by stressing procedural safeguards as an important point when deciding on the state's scope of margin of appreciation.[757]

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[754] *Blečić v Croatia* (n 651).

[755] *Blečić v Croatia* (n 653), [85]. The Grand Chamber said that the alleged interference was the termination of the applicant's tenancy and that act occurred when a judgment terminating the tenancy became *res judicata*, which was in February 1996 when the Supreme Court reversed the County Court's judgment. According to the majority, the subsequent Constitutional Court decision of November 1999 was simply the exercise of a domestic remedy and resulted in allowing the alleged interference to subsist. This reasoning and this kind of deduction is completely inconsistent with the Court's previous jurisprudence in relation to the application of the Convention *ratione temporis*. With this judgment the Court declared that the decision of the Constitutional Court is not relevant for the *ratione temporis* issue because this decision "only resulted in allowing the interference allegedly caused by that judgment – a definitive act which was by itself capable of violating the applicant's rights – to subsist." *See* Dissenting opinion of Judge Loucaides joined by Judges Rozakis, Zupančič, Cabral Baretto, Pavlovschi and David Thorn Björgvinsson and Dissenting opinion of Judge Zupančič joined by Judge Cabral Barreto.

[756] *Paulić v Croatia* (n 213).

Finally, in *Bjedov v Croatia* which is the most recent Croatian case concerning the issue of special protected tenancy the Court found a violation of Article 8.[758] Just like Mrs Blečić, the applicant was elderly and of poor health and absent from her flat due to special war circumstances. However, unlike in *Blečić*, in the *Bjedov* case the Court found a violation of the applicant's Article 8 right to respect for home claiming the failure of the state authorities to analyse the issue of proportionality and reasonableness of the applicant's eviction. The Court reached this decision even though the applicant was offered alternative accommodation in a Home for Elderly, which was not the case for Mrs Blečić. The same criteria could have easily been applied by the Court in *Blečić*, but the Chamber in the *Blečić* case decided that satisfying housing needs prevailed over the applicant's right to respect for her home (while Grand Chamber found the issue to be outside its temporal jurisdiction). Since the *Bjedov* case was decided in May 2012, and Croatia has numerous unresolved housing issues related to the persons that left their special protected tenancies during the war, it remains to be seen whether the Court will continue to follow its reasoning from *Bjedov* or from *Blečić*.

A similar situation can be found in the following 'UK Roma people cases', where the Court showed the same lack of precision and consistency when deciding whether a violation of Article 8 occurred. In these cases the Court agreed that there was a common standard recognising the special needs of minorities, and yet it decided to ignore it. In *Chapman* the Grand Chamber found that the enforcement of planning restrictions pertaining to land owned and occupied by gypsies did not constitute a breach of the applicant's right to respect for private and family life and thereby no violation of Article 8 had occurred.[759] This judgment was not reached unanimously and 7 judges considered that there had been a violation of Article 8. The majority of judges considered that since they found no violation in the previous *Buckley* judgment, for the reasons of legal certainty, foreseeability, and equality before the law, that it should not depart, without good reason, from precedents laid down in previous cases. The majority also rejected the idea of state's obligation to provide an individual, or even an individual who is a member of an endangered minority, with a home or any kind help regarding their accommodation. The minority, on the other hand, considered that a violation had

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[757] Ibid [40].
[758] *Bjedov v Croatia* (n 657).
[759] *Chapman v United Kingdom* (n 11).

occurred.[760] They claimed that the Court had a duty to review the approach adopted in the *Buckley* case in light of current conditions and the arguments put forward by the parties.

In the next Roma people case concerning the right to adequate housing under Article 8[761] the Court actually did find that the applicant's Article 8 right to home had been violated. Just like in *Paulić*, it did so because it placed particular emphasis on the lack of procedural protection.[762]

Other UK Roma people cases, all decided on 18 January 2001, were decided in the same way as *Buckley* and *Chapman*,[763] meaning that the Court found no violation of Article 8.[764] In all these cases the facts were quite similar, and as with the *Chapman* case the judgment was delivered by the Grand Chamber with a minority expressing a dissenting opinion, and invoking the same arguments as in *Chapman*. Only in the cases of *Connors* and *Kay* did the Court narrow the margin of appreciation by referring to the seriousness of interference combined with a lack of procedural safeguards.

However, in the latest case involving Roma people and their eviction the Court decided to change its approach. In *Yordanova and Others v Bulgaria* the Court did find a violation of Article 8, and it did so not by invoking procedural safeguards, but on the basis that the applicants were members of a disadvantaged group facing a risk of becoming homeless if removed. Here, just as in the UK cases, the applicants were illegally on the land and under national legislation the state could have evicted them. However, the Court decided to narrow the state's margin of appreciation and although it again emphasized that the state is not under an obligation to provide housing, it is clear that with this case it placed new positive obligations on states under Article 8. It remains to be seen whether the Court will follow this approach in its future jurisprudence or whether it will represent an exceptional decision.

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760 Ibid, Joint Dissenting Opinion of Judges Pastor Ridruejo, Bonello, Tulkens, Strážnická, Lorenzen, Fischbach and Casadevall.
761 *Connors v United Kingdom* (n 608).
762 The Court also found a violation of Article 8 due to the lack of procedural safeguards in *Kay v United Kingdom* (n 632) (the procedural safeguards required by Article 8 for the assessment of the proportionality of the interference had not been observed in that the applicants had been dispossessed of their homes without the proportionality of the measure being determined by an independent tribunal, so that there had been a violation of Article 8.
763 Except for the *Kay* case (n 631).
764 *Coster v United Kingdom* (n 623); *Beard v United Kingdom* (n 634); *Lee v United Kingdom* (n 634); *Smith (Jane) v United Kingdom* (n 634).

In the third group of housing cases discussed under Section 7.3.3. the Court has, so far, decided to restrain itself from finding violations of Article 8. However, the Court pointed out that although not creating a right to a home per se, the positive duty in Article 8 to respect private and family life did not absolve the government of all responsibilities in respect of housing needs.[765] By making this statement, the Court gave itself space for delivering judgments with different conclusions in the future.

8.3 CONCLUSION

The Court has shown greatest consistency in cases concerning detention conditions and healthcare in prisons. One can assume that the reason for this is the clear standards set out by the CPT that the Court is using when delivering judgments. When it comes to the right to a healthy environment, healthcare in general, and the right to adequate housing, the Court has shown quite a big amount of inconsistency. The probable reasons for such inconsistency are that these rights are not originally guaranteed under the Convention and that there is a lack of clear standards established for these cases. By creating a consistent group of judgments, as it did with the detention condition cases, the Court could possibly have created precedents for its later decision-making process. Instead, it created a great deal of uncertainty for states and the applicants by providing no defined standards as to when it will find a violation of a certain Convention right. In my opinion, it would be best for the Court if it had not entered this sphere at all and left the protection of the rights discussed in the thesis to the CPT and the ECSR. By doing so, it would have avoided the inconsistency and uncertainty that applicants and states are facing today.

[765] *Marzari v Italy* (n 607).

CHAPTER IX

THE LEGITIMACY OF THE EUROPEAN COURT

9.1 INTRODUCTION

In this chapter attention will be given to the legitimacy of the Court in relation to the problems arising out of the Court's wide use of its interpretative powers, often inconsistently, that have led to the judgments concerning issues not guaranteed under the Convention but under different European instruments. Before turning to some theoretical discussions, I would like to mention one recent and strong criticism of the work of the Court, where its legitimacy has been completely denied, that of Lord Hoffmann's speech in 2009 "The Universality of Human Rights."[766]

Although in some respects Lord Hofmann is too critical,[767] one part of his speech is rather interesting from the aspect of this thesis:

"The proposition that the Convention is a "living instrument" is the banner under which the Strasbourg court has assumed power to legislate what they consider to be required by "European public order". I would entirely accept that the practical expression of concepts employed in a treaty or constitutional document may change. To take a common example, the practical application of the concept of a cruel punishment may not be the same today as it was even 50 years ago. But that does not entitle a judicial body to introduce wholly new concepts, such as the protection of the environment, into an international treaty which makes no mention of them, simply because it would be more in accordance with the spirit of the times."[768]

At the conclusion of his speech Lord Hoffmann said "I have no difficulty about the text of the European Convention…The problem is the Court; and the right of individual

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[766] 'The Universality of Human Rights', Speech by Lord Hoffmann at the Judicial Studies Board Annual Lecture 2009, <http://www.judiciary.gov.uk/media/speeches/2009/speech-lord-hoffman-19032009> accessed 11 July 2012.

[767] For example, when quoting Bentham and saying that the cases mentioned (*O'Halloran and Francis v United Kingdom, Al-Khawaja and Tahery v United Kingdom* and *Hatton v United Kingdom*) are examples of teaching grandmothers to suck eggs. Ibid [10] and [28]-[33].

[768] Ibid [36].

petition, which enables the Court to intervene in details and nuances of the domestic laws of Member States."[769]

The speech of Lord Hoffmann is very sceptical about the role played by the Court and he would rather see it as a forum for theoretical discussion without any real judicial powers than as a court with the power to deliver binding decisions on states.[770] There were numerous criticisms of Lord Hoffmann's speech.[771] In my criticism of the Court, I would not go nearly as far as Lord Hoffmann did, but I do think that the Court should start imposing some boundaries on its interpretation of the Convention rights and try to remain consistent in its decision-making.

Why am I now turning to the question of legitimacy of the European Court? The main reason is because it was one of the issues raised in the research hypothesis. Furthermore, according to scholars J. Gibson and G. Caldeira, legitimacy is the single most important attribute for legal institutions. "Legitimacy provides courts' authority, it allows them the latitude necessary to make decisions to the perceived immediate interests of their constituents."[772] As a supranational regional human rights court, the Court does not have enforcement or sanctioning powers. Its main task is to judge the actions of exactly those state authorities upon whose support it relies to enforce its judgments. Thus, the Court relies on its legitimacy to gain respect and deference from domestic judges and politicians.[773]

The definitions of legitimacy are numerous, but the most commonly used comes from T. Franck who wrote "Legitimacy is a property of a rule or rulemaking institution which itself exerts a pull towards compliance on those addressed normatively because those

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[769] Ibid [44].

[770] For the recent criticism of the Court see an article published online in the Daily Telegraph (7th February 2011) 'UK should withdraw from European Court of Human Rights' as a response to *Hirst (No.2) v UK* where Lord Hoffmann was quoted: "'International institutions which are set up by everyone become in practice answerable to no one, and courts have an age-old tendency to try to enlarge their jurisdictions,"… "And so the Strasbourg court had taken upon itself an extraordinary power to micromanage the legal systems of the Member States of the Council of Europe (or at any rate those which pay attention to its decisions) culminating, for the moment, in its decision that the UK is not entitled to have a law that convicted prisoners lose, among other freedoms, the right to vote." <http://www.telegraph.co.uk/news/worldnews/europe/8307782/UK-should-withdraw-from-European-Court-of-Human-Rights.html> accessed 11 July 2012.

[771] See Michael O'Boyle 'The Legitimacy of Strasbourg Review: Time for a Reality Check?' in *La conscience des droits : mélanges en l'honneur de Jean-Paul Costa* / [ouvrage coordonné par Patrick Titiun et réalisé avec l'assistance de Patricia Dumaine] (Paris : Dalloz 2011), 489-498.

[772] James L. Gibson & Gregory A. Caldeira, 'The Legitimacy of Transnational Legal Institutions: Compliance, Support, and the European Court of Justice' (1995) 39 AM. J. POL. Sci. 459, 460.

[773] Cali, Koch and Bruch (n 43).

addressed believe that the rule or institution has come into being and operates in accordance with generally accepted principles of right process."[774] Another widely accepted definition is given by I. Clark: "Legitimacy is international society's aggregate instrument for seeking an accommodation between competing norms, and is essentially a political condition grounded in degrees of consensus about what is considered acceptable."[775] Furthermore, it has been suggested that "[l]egitimacy is the missing link in solving the mystery of how the international system obligates without a coercive sovereign."[776] All these definitions show us the importance of legitimacy for every institution.

According to T. Franck, and this division can also be found in other papers on legitimacy of the Court,[777] there are three basic models of legitimacy. The first model is given by theorists led by M. Weber and H. Kelsen, who define legitimacy in terms of rather narrowly specific process. This model is also called an 'input' legitimacy defining it as an attribute which a norm or a decision of an institution possesses only if it was adopted or created in accordance with accepted procedure. The second group of theorists is interested not only in how a ruler, and a rule, was chosen but also "whether the rules made and commands given have been considered in the light of all relevant data, both objective and attitudinal."[778] The third group, which is composed primarily, but not exclusively of neo-Marxist philosophers, focuses primarily on the outcomes. In that view, "a system seeking to validate itself - and its commands - must be defensible in terms of the equality, fairness, justice and freedoms realised by those commands."[779]

9.2 THE LEGITIMACY OF THE EUROPEAN COURT

Founded on one or more of the above presented theories are five different models of legitimacy that, arguably, provide a foundational basis for the (Court's) overall legitimacy. Those are: (1) Formal legitimacy; (2) Procedural legitimacy; (3) Social

774 Franck, *The Power of Legitimacy among Nations* (n 38), 19.
775 Jackson (n 20), 793 (Quoting Ian Clark, *Legitimacy in International Society* (OUP 2005)).
776 Jose E. Alvarez 'The Quest for Legitimacy: An Examination of The Power of Legitimacy Among Nations by Thomas M Frank' (1991) 24 N.Y.U. J. INT'L L. & POL. 199, 206 (book review).
777 See Kanstantsin Dzehtsiarou 'Does consensus matter? Legitimacy of European consensus in the case law of the European Court of Human Rights' (2011) Jul P.L. 534; and Jackson (n 21).
778 Franck, *'Why a Quest for Legitimacy?'* (n 38), 543.
779 Ibid.

legitimacy; (4) Normative legitimacy; and (5) Legal legitimacy.[780] The Court's "overall" legitimacy is built upon the legitimacy it is afforded within each of the five models and the Court's legitimacy depends upon the aggregate legitimacy of the five models.[781]

The first model of legitimacy, formal legitimacy, is concerned "with the extent to which all the applicable legal requirements were satisfied when the entity in question was set up."[782] In other words, this model is concerned with a legal pedigree of an institution. There is not much need to question this dimension of legitimacy since the Convention has entered into force, and it became a valid treaty in 1953, after the necessary precondition, which was ratification by 10 Member States, had been satisfied. The Convention itself, under Article 19, provided for the creation of the Court, therefore, the Court can be considered to have formal legitimacy.

The second model of legitimacy, as expressed by J.L. Jackson is procedural legitimacy, which in turns depends upon its function being perceived as "legalistic": for a Court that means that its procedure entails "adjudicating and rendering decisions in accordance with the rule of law, as well as performing its functions in both a transparent and participatory manner."[783] Adjudicating decisions in accordance with the rule of law and performing functions in transparent and participatory manner are interconnected while the rule of law as common heritage of State parties to the Convention, as stated in the Preamble of the Convention. The performance of the Court's functions can be seen in the Court's Rules as well as in the Convention's provisions. According to Jackson procedural legitimacy is dependent on the perception that the procedures are legalistic, that is particularly because "absent coercion, people are not likely to accept and consent to the judgments of a tribunal perceived to lack "legalistic" procedures."[784]

Therefore, the procedural dimension is about the Court's judicial-making process and on the acceptance that its reasoning leads to certain judgments. The Court's judicial-making process consists of delivering Chamber judgments in closed sessions, while

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[780] Jackson (n 21), 784.
[781] Similar division of the Court's legitimacy can be found in Cali, Koch and Bruch (n 42) where there are three dimensions of legitimacy: The Constitutive dimension; the Performance dimension and the Social dimension and they generally encompass the same issues as the above stated five models.
[782] Jackson (n 21), 794 (quoting Anthony Estella, *The EU Principle of subsidiary and its Critique* (OUP 2003), 39).
[783] Ibid, 95 (paraphrasing Vanessa A. Baird, 'Building Institutional Legitimacy: The Role of Procedural Justice' (2001) 54 POL. RES. Q. 333, 350 and Mattias Kumm 'The Legitimacy of International Law: A Constitutionalist Framework of Analysis' (2004) 15 EUR. J. INT'L L. 907, 911).
[784] Jackson (n 21), 795.

Grand Chamber session are open to the public, but both processes of drawing up judgments are made in closed sessions. However, since the Court is obliged to give reasoning for its judgments and make their judgments public, we can attribute legitimacy to this part of performance dimension.[785] However, this legitimacy is most controversial and if the Court continues with its extensive and inconsistent interpretation, it will fail on the legitimacy test.

The main reason for questioning this model of legitimacy is the issue of the Court's commitment to the rule of law. The rule of law is mainly viewed as a limitation on executive power but courts too are subject to the rule of law. There are numerous divisions of the rule of law into purposes and elements essential to fulfilling these purposes. Professor R. Fallon identified three purposes: "First, the Rule of Law should protect against anarchy and the Hobbesian war of all against all. Second, the Rule of Law should allow people to plan their affairs with reasonable confidence that they can know in advance the legal consequences of various actions. Third, the Rule of Law should guarantee against at least some types of official arbitrariness."[786] As to the elements Fallon lists, the first one is the capacity of legal rules, standards, or principles to guide people in the conduct of their affairs. People must be able to understand the law and comply with it. The second element is efficacy. The law should actually guide people, at least for the most part. The third element is stability. The law should be reasonably stable, in order to facilitate planning and coordinated action over time. The fourth element of the rule of law is the supremacy of legal authority. The law should rule officials, including judges, as well as ordinary citizens. The final element involves instrumentalities of impartial justice. Courts should be available to enforce the law and should employ fair procedures.[787] There are numerous such lists[788] but what they all have in common is that a commitment to the rule of law must include things like an equal or

[785] We might also question the process of the election of judges under this model. However, in my opinion, this is not the most problematic issue within the procedural legitimacy, nor is it of much relevance for this thesis.
[786] Richard L. Fallon Jr., "'The Rule of Law" as a Concept in Concept in Constitutional Discourse' (1997) 97 Colum. L. Rev. 1, 7-8.
[787] Ibid, 8-9.
[788] See Cass. R. Sustein 'Problems with Rules' (1995) 83 Cal. L. Rev. 953, 971-978; and Antonin Scalia 'The Rule of Law as a Law of Rules' (1989) 56 U. Chi. L. Rev. 1175, 1176.

impartial application of law, the predictability of law, and that law is applied in a non-arbitrary way.[789]

The problematic issue in the context of judgments with significant socio-economic elements discussed in the thesis is the equal application of law and its predictability. As we have seen, the Court is only consistent when delivering judgments concerning violations of Article 3 based on unsatisfactory detention conditions and healthcare in prisons[790] and when ruling as inadmissible applications concerning the issue of providing healthcare in general. However, when it comes to providing healthcare in general the Court has shown it might start imposing obligations on states to introduce general healthcare measures.[791] As to the right to a healthy environment and the right to adequate housing the Court has a shown lack of consistency and clear standards that would enable states to know their obligations under the Convention. Therefore, the requirements of predictability and equality in application of law can be questioned. The Court is placing obligations on states to which they have not agreed when signing the Convention and even more, it is very often doing so in an inconsistent manner. By doing so, it is creating uncertainty among states as to what their obligations under the Convention are and which state's behaviour will be characterised as a violation of the Convention and which will not.

Although states have so far, on most occasions, accepted the Court's reasoning and have not questioned the Court's actions regarding respect of the rule of law, if the Court continues to broaden the scope of the Convention's provisions into the socio-economic sphere of human rights protection, particularly if it continues doing so in an inconsistent manner, states might start opposing the Court's reasoning. In conclusion, the fulfilment of procedural legitimacy requirements is seriously compromised nowadays because of the Court's entrance into the socio-economic sphere of human rights by which it imposes obligations on states to which they have not agreed when signing the Convention. Furthermore, the Court is often reading in these new rights in an inconsistent manner, creating ever-greater uncertainty and compromising its legitimacy even more.

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[789] Brauch (n 11), 124. The Court itself also pointed out that it is in the interests of legal certainty, forseeability and equality before the law that it should not depart, without good reasons from its previous case- law. *Chapman v United Kingdom* (n 11) [70].
[790] Although see *Stojanović v Serbia* (n 736) and *N. v United Kingdom* (n 568).
[791] *Georgel and Georgeta Stoicescu v Romania* (n 231).

Third type of legitimacy is social legitimacy. According to J.L. Jackson social legitimacy is "gauged by an institution's ability to command acceptance and consent, as well as by ability to generate compliance with the decisions of the institution."[792] Furthermore, "acceptance, consent and compliance are based on conscious decisions resulting from the perception that a particular institution is formally and procedurally legitimate."[793] When looking at the high rate of compliance by states with the Court's judgments and the increase in the number of applications,[794] one might presume that the Court has social legitimacy.

Since the Court has no available sanctions in case of states' non-compliance, it relies on its persuasive abilities to get states to execute its judgments.[795] The Court has so far largely enjoyed respect and only rarely have states rejected to accept the Court's judgment and refused to execute it.[796] Therefore, when talking about this aspect of legitimacy, the Court has, so far, fulfilled the necessary preconditions.[797] However, will it remain that way? With the Court delivering judgments with significant socio-economic elements this aspect of legitimacy, looked at from the perspective of the states' readiness to execute the Court's judgments, might also become questionable in the very near future. Also, as we have seen in the previous chapters, sometimes even when states are willing to execute judgments, its socio-economic constraints make only progressive realisation possible. Therefore, because of the Court's imposition of obligations with significant socio-economic elements the execution process is also compromised and it might become even more endangered if the states start to oppose the execution of judgments containing obligations to which they did not agree when they signed the Convention.

Later on, Jackson points out two more dimensions or models of legitimacy: normative legitimacy and legal legitimacy. He differentiates social legitimacy from normative

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792 Jackson (n 21), 796.
793 Ibid.
794 See n 9.
795 Dzehtsiarou (n 777), 536.
796 Speech of V. Putin concerning *Ilascu and Others v Moldova and Russia,* House of Commons, Foreign Affairs Committee, Global Security: Russia, Second Report of Session 2007-2008, <http://www.publications.parliament.uk/pa/cm200708/cmselect/cmfaff/51/51.pdf> accessed 11 July 2012 [38].
797 Although the necessity of states' consent for the legitimacy has nowadays been questioned, for example Letsas claims that the issue of consent is much less relevant after 50 years of existence of the Court (George Letsas, 'The truth in autonomous concept: how to interpret the ECHR' 2004 15(2) E.J.I.L. 279, 304; while Macdonald wrote that the whole system of the European human rights protection rests on the "fragile foundations of the consent of the Contracting Parties." Macdonald, 'The Margin of Appreciation' (n 192), 123.

legitimacy, saying that while social legitimacy is contingent on subjective perceptions of an institution's formal and procedural legitimacy, normative legitimacy can be seen "as conferring legitimacy though the institutionalization and protection of "higher order" or constitutional norms."[798] Since the Convention is a supranational document on human rights, we can attribute normative legitimacy to the Court when deciding whether the violations of rights contained in the Convention, rights that can be considered as high order norms, occurred. As to the rights not clearly in the Convention the Court has, so far, never clearly stated that it is including a new right but it invoked exceptional circumstances or activist interpretative methods for extending the scope of a certain right. However, if it continues to broaden the scope of the Convention into areas protected under different human rights instruments, this type of legitimacy will also become threatened.

Finally, legal legitimacy can be considered as a "synthesis of the formal, procedural, social and normative models."[799] Therefore, the legal legitimacy of the Court exists as a derivative of it having legitimacy under the four models presented above, where formal and procedural legitimacy are considered to be essential.

The main reason for the Court to be considered legitimate is the fact that the Convention system has been operating for almost 60 years now and it has never been questioned by the High Contracting States, nor have states ever withdrawn themselves from the Convention.[800] Even more importantly, states have willingly and freely ratified the Convention and thereby the jurisdiction of the Court.[801] Even today, when there are a huge number of applications followed by a large number of the Court's judgments finding a violation of a Convention, states do not show any sign of "desire to dismantle the Court out of a suddenly appeared conviction that its activities are constitutionally questionable or disreputable."[802] Also, since the Court has no direct coercive mechanism to enforce its judgments, the fact that the States willingly enforce its judgments shows that they consider it to be legitimate. Furthermore, when it comes to the national courts, advocating an increased level of judicial activism may be considered inappropriate, but

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[798] Jackson (n 21), 797-798.
[799] Ibid, 798.
[800] Only Greece has withdrawn is membership of the CoE and therefore it also withdrew from the Convention in 1970, however that was for the purely political reasons, and not because it questioned the legitimacy of the Convention system.
[801] This is following on from the changes to the Convention system from 1998 and Protocol 11, when the jurisdiction of the Court became compulsory for all the States parties to the Convention.
[802] O'Boyle, 'The Legitimacy of Strasbourg Review…' (n 770), 492.

the Court had to develop and ensure that the rights protected are effective and practical.[803] The Convention has from its very beginnings been perceived as a living instrument capable of evolution. However, in the process of evolution the Court must strike a balance between change and consistency, if it wants to preserve its legitimacy. The Convention has to evolve in a predictable and consistent manner, by doing so it can increase its legitimacy instead of endangering it.[804]

Despite general acceptance of the Court's legitimacy, it is being questioned now more than ever by scholars and politicians, particularly in the United Kingdom.[805] In order for the Court to maintain its validity and legitimacy it must base its judgments on a consistent application of the Convention, clear rulings, dialogue between the Court and national authorities, and by providing clear guidance to Contracting States,[806] all in relation to the commitment to the rule of law. This is not something that the Court appears to aspiring towards today; rather, it is departing from these legitimacy requirements more than ever. As we have seen, its procedural legitimacy is most seriously threatened because of judgments with significant socio-economic elements that include rights already protected by different CoE instruments to which the states have not signed up to under the Convention. Also, often the Court is delivering such judgments in an inconsistent manner, and in turn it is compromising its procedural legitimacy, that is dependent on the commitment to the rule of law, even more. Finally, as we have seen, because judgments with significant socio-economic elements are often inconsistent its normative and social legitimacy is becoming more and more compromised. Instead of endangering and compromising its legitimacy by entering the sphere of human rights protection clearly not stipulated for protection under the Convention but under other human rights instruments, the Court should aspire to remain the most effective human rights protector in Europe and to retain its legitimate role.

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803 Ibid, 1713.

804 Ibid, 1714.

805 See (besides the above presented Lord Hoffman's opinion) James Slack, *Named and Shamed: The European Human Rights Judges Wrecking British Law*, DAILY MAIL (5 February 2011) <http://www.dailymail.co.uk/news/article-1353860/Named-shamed-The-European-human-rights-judges-wrecking-British-law.html> accessed 11 July 2012; or David Davis and Jack Straw, the Spectator (18 January 2011) <http://www.spectator.co.uk/coffeehouse/6626533/davis-and-straw-unite-against-prisoner-voting-rights.thtml> accessed 13 August 2012.

806 Kanstantsin Dzehtsiarou and Alan Greene, 'Legitimacy and the Future of the European Court of Human Rights: Critical Perspectives from Academia and Practitioners' (2011) 12 (10) German Law Journal 1707, 1710.

CHAPTER X

CONCLUSION

In revisiting the research hypothesis, the main issues that have arisen in the course of the thesis are the problems that arise when the Court delivers judgments interpreting the Convention so as to read significant socio-economic elements into Convention rights. Such interpretation of the Convention rights is especially problematic where this leads the Court into areas that fall within the sphere of other CoE instruments, in particular the ECS and the ECPT. Although theoretically interpreting the Convention rights as to include rights with significant socio-economic elements and protecting them through the Court's binding decisions might look attractive, in practice it is rather complex and problematic. There are numerous problems arising when the Court delivers judgments with significant socio-economic elements. Those problems have been discussed throughout the thesis, most notably concerns regarding the implementation of judgments and the Court's workload, as well as issues such as the lack of consistency in the Court's judgments and finally the legitimacy of the Court's actions. The thesis focused on four areas where these problems arose: detention conditions and healthcare in prisons, the environment, healthcare in general, and housing.

First, the execution of judgments having significant socio-economic elements often brings considerable difficulties for the states concerned. In most cases, compliance with such judgments is financially demanding and time-consuming, and requires general, rather than individual, measures to be taken. Secondly, by reading a significant socio-economic dimension into many Convention rights, the Court encourages more applications, thereby adding to its already excessive workload. As we have seen, despite the substantial increase in the Court's productivity and its output in general, the caseload continues to rise considerably, putting the effectiveness and credibility of the Convention system in serious danger. Because the Court has at times inconsistently read in rights with significant socio-economic elements to which states have not agreed when signing the Convention, the Court also threatens its overall legitimacy, because its

overall legitimacy depends upon the aggregate legitimacy of the five models discussed in chapter IX.

It is true that is often hard to give a clear-cut distinction between civil and political rights and economic and social rights since both groups of rights can give rise to both positive and negative obligations, have budgetary implications and can sometimes be achieved only progressively. However, on a regional and global level the fact is that, despite constant stressing of indivisibility and interconnection of civil and political and economic and social rights, these rights are generally still not indivisible. The division of the rights into different instruments illustrates doubt about their indivisibility. Within the CoE, economic and social rights and civil and political rights are strictly separated within different human rights instruments. The ECHR is the only document on civil and political while its counterpart in economic and social rights is the ESC. Another important instrument for this thesis is the ECPT which, although it is not a document on economic and social rights, has a compliance body, the CPT, that deals exclusively with protecting persons deprived of liberty from various forms of ill-treatment. Only rights guaranteed under the Convention are protected by the Court that delivers binding judgments on states while the ESC system, because of the Collective Complaints system, can be regarded as quasi-judicial and the ECPT protects rights through a non-judicial body, the CPT.

At the time when the Convention was drafted the idea of judicial protection of human rights at the regional level was just 'born' and it was left to see where it would lead. The Convention contains a short list of civil and political rights which should have been subjected to certain judicial interpretation if it was to provide an effective protection of rights. The Court had already in the early years of its work shown it would interpret the Convention in accordance with its object and purpose relying more on the activist methods of interpretation. Nowadays, it mostly uses the living instrument doctrine and the doctrine of effectiveness to justify its progressive reasoning together with the margin of appreciation to stress the Court's subsidiary role.

When the Court first started using the living instrument doctrine, conditions were much different to those pertaining today. In 1978, when the *Tyrer* judgment was delivered, the number of States parties to the Convention was 16 and from the date of delivering its

first judgement in the *Lawless* case[807] until the end of 1978, the Court had all in all delivered 31 judgments.[808] Comparing that with the today's situation, where there are 47 State parties and when in 2011 alone 64,547 applications were allocated to judicial formation (with judgments delivered in 1,511 applications), we can see that the situation has changed dramatically.[809]

Looking back at the areas on which this thesis has focused, the right to satisfactory detention conditions and healthcare in prisons was first discussed. The Court has started guaranteeing the right to satisfactory detention conditions and the right to healthcare in prisons under Article 3 which prohibits torture, inhuman and degrading treatment and punishment. From 2001 and the *Dougoz* judgment, when the Court for the first time found a violation of Article 3 based on unsatisfactory detention condition, it has dealt with numerous applications concerning these issues. What can be concluded after presenting the Court's case-law is that the execution of judgments concerning detention conditions and healthcare in prisons has numerous socio-economic elements and includes numerous general measures which are financially demanding and time-consuming. Also, detention conditions and healthcare in prisons usually affect a large group of detainees and are thereby more collective than individual. The Court is currently overwhelmed with detention condition cases and it takes years for states to execute detention conditions judgments in their entirety. For that reason, I conclude that the issue of general detention conditions should be left to the CPT to deal with, particularly since this is an issue not originally intended for protection under the Convention and has numerous socio-economic elements in its execution. The CPT, although a non-judicial body, has established numerous standards on detention conditions and healthcare in prisons and it expects states to immediately takes steps to bring situation in conformity with those standards. It is aware that doing so can only be achieved gradually and it regularly examines states' progress. Furthermore, the Court mainly relies on the CPT findings when it examines whether the situation concerning detention conditions and healthcare in prisons is satisfactory, and the CoM is doing the same when supervising the execution of judgments. Under Chapter IV, the Court's case-law, the CoM supervision of execution of those judgments and the CPT reports

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[807] *Lawless v Ireland* (n 196).
[808] Data retrieved from the HUDOC database, <http://www.echr.coe.int/ECHR/EN/Header/Case-Law/Decisions+and+judgments/HUDOC+database/> accessed 1 June 2012.
[809] European Court of Human Rights in facts and figures 2011 (n 156), 10.

have been discussed to show that the detention conditions and general prison healthcare issues are better left for the CPT to deal with. It has been argued that whether the pressure on improving the detention conditions and healthcare service in prisons is coming from the CPT or from the Court and the CoM will not make a difference in terms on improving the situation. It will only add to the Court's already excessive workload and compromise the importance of Article 3 since even when the state is willing to comply with the judgement and execute it, most of the time introducing measures in order to comply with those judgements will be a long and extremely expensive process. Despite the fact that not much inconsistency can be found in the Court's case-law regarding detention conditions and healthcare in prisons, it is an issue that is better left for the CPT to deal with, leaving the Court to deal with more serious violations of Article 3.

Regarding the right to a healthy environment, the Court has through its interpretation of Article 8 (and occasionally Article 2) started guaranteeing the right to a healthy, sound and decent environment. The Court is doing so even though the idea of making an Additional Protocol to the Convention on the right to a healthy environment had been rejected twice, in 2003 and 2009 by the Committee on Legal Affairs and Human Rights (CLAHR) of the Parliamentary Assembly of the CoE. The CLAHR's Rapporteurs rejected the idea of making such additional protocol and stated that to include the protocol to the Convention which was so vague would lead to uncertainty and be a substantial increase for the Court's caseload. Despite these opinions, the Court continued in guaranteeing the right to a healthy environment under the Convention, mainly under its Article 8. However, the Court has not made clear standards as to when it will allow states wide and when narrow margins of appreciation in the healthy environment cases. It is rather unclear when the interests of the applicant for a healthy environment will prevail over the interest of the economic well-being of the state. Therefore, the biggest deficiency of guaranteeing the right to a healthy environment under the Convention is the Court's inconsistency when deciding on the healthy environment issues. Also, even when the Court narrows the state's margin of appreciation and decides that the applicant's interests will prevail, the execution of such judgments is long and financially demanding. Unlike the Court, the ECSR has set out clear standards regarding the right to a healthy environment, both under its Reporting and under the Collective Complaints system and placed it within the mainstream of

human rights.[810] Furthermore, the ECS is suitable for collective complaints whilst the Convention system only deals with individual complaints and, as we have seen, environmental issues usually concern a large group of people rather than one individual. Despite the fact that the ECSR case-law is not nearly as numerous as the Court's, it is constantly developing and is much better suited for dealing with the right to a healthy environment.

As to the right to a healthcare in general the Court is still rather reluctant in guaranteeing it both under Article 8 and under Article 2, constantly stressing its socio-economic implications. However, the Court has shown certain indications it might look into applications concerning the right to a healthcare in general and it has even delivered a judgment, *Georgel and Georgeta Stoicescu v Romania*, where it found a state to be in violation of Article 8 for not taking general and preventive healthcare measures. This is not a good idea, not only because of the possibility of even bigger increase of applications that might come before the Court but also because the Convention is not suitable for dealing with general healthcare issues. The right to a healthcare is guaranteed under the ESC and it has numerous socio-economic characteristics: it is more collective then individual, it has strong financial implications for a state and it can only be achieved progressively. The Court has only dealt with the healthcare issues of detainees under Articles 2 and 3. As to the Article 3 the Court has also dealt with healthcare issues in deportation cases where the applicants invoked lack of satisfactory healthcare in countries where they were supposed to be deported. Although the Court was willing to discuss the deportation cases, it has shown inconsistency and again compromised the absolute nature of Article 3. On the other hand, Article 11 of both the Original and the Revised ESC guarantees the right to health and unlike the Court, the ECSR has shown great deal of consistency when deciding cases concerning healthcare issues and it has set out clear standards concerning the right to healthcare through its conclusions and decisions.

Finally, when it comes to the right to adequate housing the Court has again shown great reluctance and inconsistency in decision-making while the ECSR has set out clear guidelines and standards. The right to adequate housing as guaranteed by the Court has been discussed in Chapter VII and the adequate housing cases were divided in three groups. Within the first group of cases the situation is clear since the Court always

[810] Trilsch (n 507), 532.

found a violation of Article 8 where state agents were directly the cause of the applicants' destruction or eviction from their homes. However, within the second group of cases, where the actions of state bodies caused applicants to lose or move from their homes, the situation is rather unclear and the Court has shown a great deal of inconsistency. As to the third group of cases the main issue was the scope of positive obligations attributed to states regarding the right to adequate housing and here the Court, just like with the healthcare cases, decided to make a distinction between economic and social and civil and political rights. All the housing cases under the Convention were decided under Article 8 except for one case, *M.S.S. v Belgium and Greece*, where the Court delivered one specific judgment stating that not providing the applicant with satisfactory living conditions amounted to a violation of Article 3. It is yet to be seen whether the Court will decide to follow this reasoning in its future case-law.

Under the ESC, the right to housing is guaranteed under three provisions (Articles 31 and 23 of the Revised ESC and Article 16 of both the Original and the Revised ESC). The ECSR has set out clear standards and guidelines as to what is expected from states in various housing issues. We have seen that when it comes to providing adequate housing for vulnerable groups, such as Roma people, the ESCR has placed clear obligations on states and set out standards regarding necessary protection of Roma people through its decisions and conclusions. Unlike the ECSR, the Court has concerning the right to adequate housing of endangered minorities (such as Roma people) shown great deal of ambiguity, uncertainty and inconsistency. Nowadays, it is unclear what are the Court's standards and expectations regarding the right to adequate housing, where it sometimes stresses that housing issues are a matter of political and not judicial decision and sometimes that applicants need special assistance, and then it decides on the scope of that special assistance under the Convention. The ECSR may not bring binding judgments, but through its conclusions and decisions it has pointed out states' obligations regarding the right to housing and although maybe there is a certain amount of imprecision there is no inconsistency or ambiguity. The Court should leave the issue of adequate housing to the ESCR to deal with.

Leaving the ESC system to deal with the right to a healthy environment, the right to healthcare and the right to adequate housing would not increase, at least not significantly, the workload of the ESCR. Under the ESC system only collective and not individual complaints are allowed therefore the number of complaints would not be as

nearly as high as the number of individual complaints before the Court. Also, today there are already numerous situations where the ESCR and the Court are dealing with the similar issues thereby duplicating each other's work. Therefore, leaving those issues to the ESC system would not significantly increase the workload of the ESC but it would significantly decrease the workload of the Court.

One cannot ignore the deficiencies of the ECS system, both under the Reporting system and under the Collective Complaints procedure. States are not obliged to accept all the ESC provisions; it takes a long time between reports on a certain provision; there is a great amount of information the ECSR requires from states under the Reporting system that makes it hard for it to make a final decision on state compliance; there is a small number of states that have ratified the Collective Complaints Protocol; and particularly, there is reluctance of the CoM to issue recommendations, both under the Reporting and under the Collective Complaints system. One of the things the CoE bodies could do is urge the CoM to issue recommendations every time after the ECSR finds the state to be in non-compliance with the ESC provisions and to make stronger resolutions. Issuing recommendations to states as well as clearer and stronger resolutions, after the ECSR has found that the state is not in compliance with certain ESC provision should be common practice of the CoM and not an exception. Furthermore, within the Reporting procedure there should be less governmental involvement, since because of the involvement of both the Governmental Committee and of the CoM, it can be said it is not sufficiently independent of the State parties to the Charter[811] and there are long time periods between the state reports and the CoM recommendations (when and if the CoM issues them). However, despite these problems, it has been argued throughout the thesis that the ESC system, that is constantly developing and improving, is still better for protection of economic and social rights then the Convention system.

We have seen numerous problematic issues arising out of the Court's jurisprudence concerning rights from the ESC ambit, from the long time it takes for states to execute such judgments, to the lack of clear standards established by the Court which creates uncertainty as to what states obligations under the Convention are, and finally to the Court's inconsistency in decision-making.

[811] Khaliq and Churchill, 'The European Committee of Social Rights: putting flesh…' (n 29), 431.

Examples of inconsistency in the Court's case-law concerning the right to satisfactory detention conditions and healthcare in prisons, the right to a healthy environment, the right to healthcare in general and the right to adequate housing were discussed under Chapter VIII. The Court has been consistent only in cases concerning satisfactory detention conditions and healthcare in prisons, mostly because of the standards set out by the CPT that are used as guidelines by both the Court and the CoM. In all the other areas the Court has shown great deal of inconsistency, which only adds to numerous problems it is facing nowadays.

Finally, reading in rights with significant socio-economic elements not envisaged or foreseen for protection under the Convention but under other CoE instruments and the inconsistency in their protection compromises the Court's overall legitimacy. First of all, the Court's procedural legitimacy is endangered since one of the preconditions of its procedural legitimacy is commitment to the rule of law. Commitment to the rule of law must include things like an equal or impartial application of law, the predictability of law, and that law is applied in a non-arbitrary way.[812] As seen, the problematic issue in the context of judgments with significant socio-economic elements is the equal application of law and its predictability, or the lack of it. Although not bound by precedents, the Court should deliver its judgments in a consistent manner. The Court threatens its legitimacy by imposing on states obligations that they have never signed up to, by often not setting clear standards when interpreting the Convention, and by being inconsistent in its judgments, thereby making it impossible for States parties to know their obligations under the Convention. Furthermore, its social legitimacy, dependant on state compliance with the judgments, is also compromised. Despite the Court being the sole body with judicial powers, when it comes to rights with significant socio-economic elements, their realisation is not that dependent on the body that adopts a decision but on the state's financial resources and willingness to execute a decision. It takes years for states to execute judgments containing significant socio-economic elements because of their financial implications and although so far states have not directly objected to executing such judgments, if the Court continues to bring judgments concerning socio-economic issues not envisaged for protection under the Convention, states might start opposing execution. Finally, while it is legitimate for the judges of the Court to interpret

[812] Brauch (n 11), 124. See also *Chapman v United Kingdom* (n 11) [70].

the Convention,[813] in order for interpretation to stay within the ambit of legitimacy it should not read new rights into the Convention, but give meaning to existing rights. Reading in new rights endangers another type of legitimacy, normative legitimacy, which can only exist if the Court protects the rights already guaranteed under the Convention. Therefore, the Court's overall legitimacy is nowadays seriously threatened. The Court should, instead of delivering inconsistent judgments with significant socio-economic elements not envisaged for protection under the Convention but under other CoE instruments, try to keep consistency and predictability in its decision-making.

The Court is intended to protect a narrow range of civil and political rights and despite having wide interpretative powers it should not protect rights already guaranteed by other European instruments. In order to provide better protection of economic and social rights within the CoE system greater emphasis should be placed on improving the ECS system, particularly the work of the CoM and on pressuring states into ratifying the Collective Complaints Protocol. Furthermore, attention should be given to supervisory systems envisaged for monitoring compliance with the CPT reports and the ECSR conclusions and decisions.

The Court is currently overloaded with pending applications and the number of judgments before the CoM that are waiting to be executed is growing rapidly. Reading significant socio-economic elements into Convention rights by the Court is not only likely to add to its large workload, it has already threatened its legitimacy and ultimately risks endangering the protection of the civil and political rights originally guaranteed under the Convention. The Court should therefore leave the protection of economic and social rights to the bodies established by the Council of Europe for this purpose.

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[813] Popović, *The Emergence of the European Human Rights Law*… (n 12); Dworkin 'Law as Interpretation'(n 12).

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